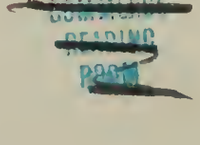

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NATIONAL REGULATION OF RAILROADS

By Hon. Martin A. Knapp,
Chairman, Interstate Commerce Commission.

If I may venture to say anything upon a subject which has nearly exhausted discussion it will be to emphasize one or two points which perhaps have not been sufficiently noted and to outline certain considerations which I regard as fundamental. The agitation for a more efficient control of interstate carriers is the outgrowth of an insistent public sentiment and expresses a determined purpose to correct existing abuses. Since the passage of the act to regulate commerce in 1887, which in many respects was understood to be a tentative and experimental measure, no important change or enlargement of its provisions has been made, except the addition of the excellent Elkins law, although its limited scope and insufficient restraints have long been apparent. Meanwhile the railway mileage has increased upwards of 50 per cent., revenues have more than doubled, numerous lines formerly independent have been merged into great systems or otherwise brought under unified control, and many other conditions have arisen which were not foreseen or taken into account when the original law was enacted. The time has arrived when this scheme of regulation should be carefully revised not only in its substantive features, but also to an extent in its methods of administration.

This does not imply that the present law should be discarded and some new theory of regulation be given a trial. There is little reason to discredit the act of 1887 or warrant the effort to belittle its operation. It is a statute of broad and beneficent aim based upon principles which are concededly wholesome and correct. Indeed, when we remember that the enormous power of the Congress under the commerce clause of the Constitution had lain dormant for nearly a hundred years, when we call to mind the amazing rapidity of railway construction during the two speculative decades that followed the Civil War, when we take into account the conditions which had grown up with that extraordinary development and realize that practices which are now regarded with reprobation were then looked

upon with tolerance and found little condemnation in the average conscience, it is quite remarkable that a law should have been passed which expresses such just rules of conduct and which contains such comprehensive and salutary provisions. It is the part of wisdom, as I believe, not to attempt any radical departure from the principles and purposes of this enactment, but to supply needed legislation for correcting its defects, strengthening its provisions and augmenting its authority.

The Basis of Regulation.

In the statements before the Senate Committee and in current discussions in the press and elsewhere there is, as it appears to me, some confusion of thought and a degree of failure to make proper distinctions. In many quarters it seems to be supposed that the one thing requisite is to increase the powers of the Interstate Commerce Commission; whether that shall be done or not is the chief point of controversy. To my mind that is only one side, and perhaps not the most important side, of this complex and obstinate problem. Without disagreeing at all with those who advocate an enlargement of the commission's authority, for I am in full sympathy with their purposes, it is entirely clear to me that other matters are of equal if not greater consequence. There is much to be considered and decided before we come to the question of administrative power, which is merely the machinery for giving effect to measures of regulation. We must begin by prescribing in the statute law, with as much precision and certainty as the case admits, the rules of conduct which it is the province of administration to apply and enforce. The substantive law must first be made ample and explicit, clear and comprehensive in its definition of legal duty and as exact as may be in its restraints and requirements. The obligations of the railroads to the public, the restrictions which limit their freedom or abridge their privileges, the standards by which the lawfulness of their conduct is to be gauged, must all be found in the regulating statute as the necessary foundation of administrative action. It is one thing to enact a code of laws to be observed by the carrying corporations, it is quite another thing to provide the means for securing conformity to that code and giving effect to its requirements. If the substantive provisions of the

statute are inadequate or defective, if its standards of obligation and duty are insufficient or inexact, the shortcoming cannot be made good by administrative machinery, however elaborate or carefully constructed.

This is the point to which I specially desire to direct attention, because just here is found the explanation, for the most part, of whatever disappointment or failure has attended the effort to give effective operation to the act of 1887. The refusal of the courts to enforce disregarded orders of the commission has shown in practically every instance not that the facts had been incorrectly or unfairly found and reported, but that the ascertained and admitted facts, whatever injustice or wrongdoing they might appear to establish, did not disclose any violation of legal duty. The courts have not affirmed that certain practices condemned by the commission were right and just, and ought to be permitted to continue, they have merely declared that those practices are *not unlawful.* So far from furnishing grounds for questioning the fitness or fairness of the commission, which really is quite beside the mark, these very decisions by exposing defects in the substantive provisions of the statute supply a persuasive argument in favor of its amendment. Had the present law established a different tribunal or relied upon the federal courts to make it effective, the practical result would have been precisely the same.

The distinction here sought to be emphasized is made apparent, at least to my mind, when we take our observation from the correct point of view. Under the commerce clause of the Constitution all legislative power over interstate carriers is vested in the Congress. That power, as was decided by the Supreme Court so far back as 1825, is plenary and exclusive and subject to no limitations except such as are found in the Constitution itself. But the Congress cannot delegate its regulating authority by general or wholesale enactment; to do so would be little more than the declaration of a sentiment. It may legislate as minutely as it chooses; for any practical purpose it must legislate not only on general lines but as specifically as the nature of the case permits as to each and every matter which is made the subject of regulation. It cannot transfer its authority to an administrative body of its own creation, or even to the federal courts, to be exercised at discretion, except within limits and probably within somewhat narrow limits. In that which

is enacted must be found alike the things required and the things forbidden. If the statute itself does not impose a duty or restraint in respect of a particular matter, there can be as to that matter no basis for adjudging that the act complained of is unlawful. In this connection it should be remembered that the common law obligations of interstate carriers, if there be any, are of little value as restraints upon wrongdoing. The misconduct which injures and the practices which work injustice are not *malum per se,* and therefore they can be corrected only by legislative enactment. That is to say, "regulation" in all important and essential respects must be regulation by the Congress. The written law must go to the full extent of prescribing requirements, imposing restraints and fixing limitations, not only in general terms but as specifically as the nature of the particular subject admits; and if the statute is wanting in this regard, if its standards of duty and liability are not ample and plainly defined, the injustice not reached or forbidden because of that defect will go without correction. In a word, the substantial features of any adequate scheme of public control must be incorporated and defined in the provisions of an act of Congress. That which the statute law does not specifically condemn and definitely enjoin, the carrier is legally free to do or omit.

The importance of what has thus been said will perhaps be better understood by pointing out its practical applicaton. The task in hand is to devise a system of regulating laws which, while preserving the benefits of private ownership, shall furnish sufficient control over railway carriers to ensure transportation charges which are reasonable and relatively just. Whatever difference of opinion there may be as to whether rates in general are higher now than they ought to be, or are liable to be excessive in the future if public authority does not amply prevent, there is a unanimous demand that rebates and every sort of private preference shall be done away with, and that rate adjustments as between different localities and articles of traffic shall be free from any unjust discrimination.

Now, to secure the results which all right-minded persons desire in this regard, it is evident that the regulating laws must at the outset require the publication of rates and charges and thereby provide, at least *prima facie* and for the time being, a legal standard of compensation for the service offered. In short, we must begin with providing an open and common rate readily ascertainable by the pub-

lic which measures while it remains in force the lawful charges of the carrier. Obviously, then, so long as observance of the standard rate is obligatory, whether it be established by the carrier's voluntary action, as is now the case, or prescribed in the first instance by public authority, the next problems of regulation are of two distinct and unlike classes. Stated in another way, there are two general but dissimilar things to be accomplished, each involving its peculiar difficulties. It is at once necessary to devise measures for ensuring conformity to the common standard and also to provide means by which the standard itself may be changed or its reasonableness tested. There is a fundamental difference between dealing with a rebate or secret concession of any kind and correcting an established and observed rate which is found to be excessive or relatively unjust. Yet adequate provision must be made for both these things in the statute law, independent of its administration, or the regulating scheme will be incomplete and disappointing. Unless both results are actually secured by substantive enactment, unless favoritism of every sort is prevented on the one hand, and on the other there are efficient means of altering an unreasonable or unjust rate which all shippers are compelled to pay, the public will lack needful protection and the duty of the carrier be incapable of enforcement.

It requires little reflection to perceive that the only efficient mode of dealing with the entire range of offenses which result from departures from the published rate is to place them in the category of criminal misdemeanors. Civil remedies for such wrongdoing are of insignificant value, for they neither afford redress to those who are injured by secret practices nor do they operate with any force to prevent the recurrence of similar misconduct. On the other hand, the appropriate means for bringing about the reduction of an unreasonable rate or a change in unjust rate relations preclude the use of criminal penalties. Within the limits of an honest difference of judgment—the limits of actual controversy—the rates established by the carrier and charged to all alike cannot in reason be made the basis of criminal liability, although they may afterwards be adjudged in some degree excessive or unfairly related. For one purpose, therefore, the suitable legislation will differ in essential character from that adapted to the other. To reach one class of offenses we must have penal statutes and criminal courts, to reach the other

class we must have standards of obligation applied and enforced by a civil tribunal. The failure to observe this primary distinction in general and in particular will leave the regulating enactment, however carefully devised and developed, more or less faulty and unworkable. Nor is it enough to recognize these unlike and diverse aims in framing the statute law; it is equally needful that each requirement be met with substantive provisions of comprehensive scope and adequate detail.

Let me illustrate with examples drawn from the act of 1887. And first, a defect in its penal provisions through failure to define, as to a distinct class of dishonest transactions, *an offense that could be proved.* It was undoubtedly intended to provide that a shipper who accepted a rebate should be guilty of a misdemeanor. That certainly ought to be the law. But the courts held, in construing the language of the second section, that it was not enough to show the payment of less than the tariff rate on a given shipment, but that in addition there must be shown the payment of a higher rate by another shipper for a like and contemporaneous service. That is, it was necessary to prove discrimination *in fact* as between the accused and some other shipper before there could be a conviction. As a practical matter this was ordinarily out of the question. For instance, it appeared that dressed beef was carried for a long time and in large quantities from the Missouri River to Chicago at materially less than tariff rates, but it also appeared that the same rate was allowed to all the packers. Although the concessions, or rebates, amounted to thousands and thousands of dollars, there was no actual discrimination as between different shippers, so far as could be ascertained, and therefore in a legal sense no criminal wrongdoing by any of them! Fortunately this loophole through which shippers escaped for years was stopped effectually, as is believed, by the Elkins law which makes the published tariff the legal standard and departure from that standard the punishable offense. But the point to be observed is that gross misconduct could be indulged in with impunity not because of any administrative shortcoming, but solely because the substantive law contained a provoking defect.

To illustrate the other and distinct phase of the subject, reference may be made to the long and short haul question. The charging of a higher rate to a nearer than to a more remote point,

though perhaps not the most serious, is undoubtedly the most aggravating form of discrimination. So obnoxious were tariff adjustments of this sort, so flagrantly wrong in many cases, that the Congress plainly intended to provide a specific remedy in the fourth section of the act to regulate commerce. The greater charge for the lesser distance was therefore prohibited "under substantially similar circumstances and conditions," and a long course of litigation followed over the legal meaning of the quoted phrase. Without reciting the cases in which this question arose, it is sufficient to say, taking the decisions together, that *dissimilarity* exists where competition, not merely of carriers but of markets as well, is present at the more distant place and absent or less forceful at the intermediate place, and that where dissimilarity is found the prohibition does not apply. Now, as a matter of fact, the higher charge for the shorter haul is rarely if ever exacted except on account of some competitive condition at the more distant point not existing at nearer places. It follows, therefore, that the exception to the rule covers practically all the actual cases and leaves the rule itself with little or nothing to act upon. A provision designed to have potent and remedial effect has been construed into a mere abstraction. I do not criticise the decisions of the courts upon this section. As a matter of statutory construction they were doubtless right. Nor is it to my present purpose to argue that the section should be amended and some practical limitation placed upon rate adjustments of this kind. That is for the Congress to determine. But I call attention to the fact that discrimination, however unjust, caused by lower charges for a longer distance—the shorter distance charges being reasonable *per se*—is not now unlawful, and that there must be a substantive change in the statute before there can be any administrative control or restraint upon this class of discriminations. It is primarily the subject of enacted regulation quite apart from the status or authority of the tribunal of administration.

Another example relates to a matter of undoubted importance. The present law in no way abridges the freedom of carriers to determine for themselves in the first instance the rates they shall charge, except the general requirement that such rates shall be reasonable and non-discriminatory, and there is no serious proposal to withdraw or limit their right to initiate such schedules as they may deem proper to establish. It is assumed that carriers will

continue to exercise their own judgment, as they do now, in deciding originally what rates they will publish and apply. This being so, it is apparent that some prescribed notice must be required of proposed changes in published tariffs. If there were no limitations upon the right of carriers to advance or reduce the rates which they have initiated, they could obviously make changes at pleasure which would be little better than not to publish rates at all. The sixth section of the act allows advances to be made on ten days' notice and reductions on three days' notice. This is the only requirement which goes to the stability of rates, a matter which deserves more attention than it sometimes receives. Plainly enough it is now feasible for a traffic manager to make an agreement or have an understanding with a given shipper, in consideration of tonnage secured, to publish a reduced rate at a certain date which may be done easily by giving a notice of three days. The tonnage in question having been obtained at this reduced rate, the carrier may at once give ten days' notice of advance to the previous figure and restore the old rate when that time has expired. The result is equivalent to a secret rebate paid to the shipper of the difference between the two rates. Neither court nor commission can now prevent a transaction of the kind suggested because the method employed is under statutory sanction. In a word, such a discrimination is not unlawful, and therefore cannot be reached or corrected so long as tariffs may be legally changed upon the short notice above stated. Believing that stability of rates is a matter of primary public concern and ought to be secured to a much greater degree than is now the case, I am strongly of the opinion that the required notice of tariff changes should be considerably extended. But my point now is that this is a regulation which pertains to the substantive law and that any injustice which results from authorized changes on such short notice cannot be corrected by strengthening the administrative machinery.

Again, the existing law permits connecting carriers to form through routes and establish joint through rates, which are usually much less than the sum of their local rates, but this they now do by voluntary action and not by virtue of any legal requirement. They are free to make such arrangements and to discontinue them as and when they see fit. The failure or refusal of connecting roads to form through routes and provide through rates sometimes inflicts

manifest hardship, and the fact that such rates cannot be compelled is claimed to discourage the construction of local and branch lines. Inasmuch as mutual service of this sort rests in the option of the carriers, it is not infrequently the case that shippers are obliged to pay full local rates over two or more roads because their managers cannot or do not agree upon lower through rates and their division. It follows that if needful joint service at proper rates is to be secured in such cases, it must be made obligatory in the substantive regulation.

Another instance of what I have in mind suggests a matter of great economic significance, and that is the relation of domestic to export and especially to import rates. It often happens now that traffic is carried from its origin in a foreign country to an interior destination in the United States at a total through rate very much less than the domestic rate from the same port of entry to the same destination. In a commercial sense of course the foreign article is carried under unlike circumstances and conditions; and this has been held by the Supreme Court to justify or permit import rates lower than domestic rates. Incidentally it may be noticed that the practical result of this ruling is at variance with our tariff policy and that in particular instances the difference in favor of the imported article may defeat the purpose of protective duties. However that may be, the act as construed in this regard, like the construction of the long and short haul clause, contains no practical restraint upon discriminations of this class, and this defect in the substantive law, if it be deemed a defect, cannot be obviated by changes in administrative methods or authority.

The same observations may be made in respect of many other matters which now give rise to well-founded complaints of discrimination, such as private car lines, terminal roads, elevators and the like. Some of these matters, at least under given circumstances, may be within the scope of the present law. Others are not embraced within its terms or are claimed by the carriers to be unaffected by its provisions. Until this claim has been passed upon by the court of last resort, which means protracted litigation, the discriminating effect of facilities and practices now unregulated must be suffered to continue. If some requirement or prohibition suited to the nature of the case is not embodied in the regulating statute the exempt transaction, however unjust or injurious, will remain a law-

ful exercise of the carrier's volition and so beyond the jurisdiction of courts or commissions. Only that which the statute enjoins can be required; only that which it makes unlawful can be prevented.

Thus it appears, if I am not mistaken, that in some important respects the foundation of the act of 1887 is badly constructed or incomplete to a degree not always appreciated. The partial failure of that act to accomplish its beneficent purpose arises mainly, as I conceive, not because the administration of the law has been lax or incompetent, nor altogether because judicial declaration has deprived the commission of authority over rates which it was originally supposed to possess, but because the substantive provisions of the statute do not provide the necessary groundwork for more successful effort. While I firmly believe that the powers of the commission should be enlarged, I also believe that it is even more essential to extend and recast the enacted rules of conduct and thereby provide the basis of effective control. It is for the Congress by its regulation to further enjoin, require, limit, restrict or forbid as may be needful or appropriate, and this is a matter which properly precedes the question of administration.

Tribunals of Regulation.

After the rules of conduct and standards of obligation to be observed by carriers have been determined and defined in the regulating statute, according as the Congress may determine, we come to the question of the agency and methods of administration. It is not now the extent or degree of authority to be exercised, but the kind of tribunal to perform the administrative duty. Shall the enforcement of the law be remitted to the federal courts or shall there be a commission to exercise legislative rather than judicial authority? In answering this question we must keep in mind the unlike and separable things to be accomplished by our scheme of regulation. As already stated, the only suitable means of securing the observance of published tariffs are criminal penalties for disregard or evasion, while the appropriate methods for bringing about such changes in those rates as justice may require are limited to civil proceedings. It is assumed that this distinction will be observed in framing the legislation and in every effort to give effect to its provisions.

Manifestly the criminal remedy can be applied only by the courts. In this respect there is no difference between a misdemeanor under the regulating statute and a misdemeanor under any other law. Both must be dealt with in the same way, and this implies in the one case as in the other a strictly judicial procedure. Therefore, all those provisions which are designed to prevent the payment of rebates and kindred practices, of whatever character or description, must be enforced by courts of proper jurisdiction, and can be enforced in no other way.

But when we consider the other field of administration, where authority is to be exercised not to secure conformity to the published standard of charges, but to change the standard itself when found unreasonable or relatively unjust, it seems plain to me that a judicial tribunal is neither suitable nor adequate. The fundamental objection to any proposal to devolve upon the courts the duty of regulating in this direction, that is, making required changes in tariff schedules, is that the questions involved are essentially legislative and not judicial. The thing to be done is not the appropriate subject of judicial determination. The courts cannot apply the requisite remedy. If the charge for a given service is fifty cents a hundred pounds and that charge is excessive, the needful change is the substitution of a lower charge for the future. This is distinctly a legislative function. The same may be said with equal certainty with reference to relative rates which discriminate between different localities or articles of traffic. The proper readjustment in such cases involves considerations which courts do not take into account, but which come within the broader range of legislative discretion. That the courts will not exercise jurisdiction to prescribe either absolute or relative rates appears to be plainly affirmed by the Supreme Court in the Reagan case, 154 U. S., 362, in the following language:

> "The courts are not authorized to revise or change the body of rates imposed by a legislature or commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work."

This distinction is tersely stated by Mr. Justice Brewer in the maximum rate case in these words:

"It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act."

Undoubtedly the courts can and will under statutory authority, and to an important extent without it, exercise such jurisdiction as will indirectly affect rates for the future, but they cannot and will not undertake to prescribe the schedule which shall take the place of one found excessive or unfairly adjusted. They can prevent the administrative encroachment of constitutional rights, but they cannot be authorized to correct the injustice of an unreasonable or preferential rate by substituting a just and reasonable standard of charges. At best and at most the control of rates by judicial action is an indirect, uncertain and limited scheme of regulation. If that plan is adopted it is quite certain that we must enter upon a long litigation to find out how much the courts can do, how much they will do and how they will do it.

Broadly speaking, the judicial machinery is provided to punish those who violate criminal laws and to decide private as distinguished from public controversies. A tariff rate which is too high or which unduly discriminates does not constitute an individual grievance merely, but affects every person who may be required to pay that rate for a transportation service. The continuance of an unjust rate or its correction is a matter of public concern, and matters of public concern, apart from the enforcement of criminal laws, are ordinarily the appropriate subject not of judicial but of legislative determination.

The notion may be far-fetched and will doubtless be combatted, but I am disposed to regard a tariff rate which has been legally established as analogous to a civil law. It answers to the broad definition of such a law because it is in effect a rule of conduct which measures the obligation of shipper and carrier alike. As a practical matter so far as the public is concerned, it does not seem to me to very much matter whether a given rate is established by the voluntary action of the carrier, by the exercise of public authority in the first instance, or by direct legislation. In either case it fixes with substantially the force of an enactment the price at which public carriage can be obtained. If that rate is departed from by any sort of forbidden preference or concession, a condition exists which

seems to me exactly like the violation of a criminal statute, as is now the case, and courts are constituted to prevent and punish such transgressions. But if the rate is itself wrong, no matter how it came to be in force, if its application produces actual or relative injustice, a condition exists which is altogether similar to an unwise or oppressive act of legislation that ought to be amended or repealed.

If rates were established, as they might be, by direct legislation, it would be manifestly absurd, assuming they were not confiscatory, to provide for their alteration by resort to the courts. The appeal in such case would be to the legislature as the only source of relief. Likewise, if rates were fixed in the first instance by public authority, as is done in several states, the courts could not interfere except to protect constitutional rights. It seems plain to me that in such cases there could be ordinarily no question for judicial cognizance. Now, how does the way in which a given rate was originally imposed affect the nature of the appropriate tribunal of regulation? If rates fixed in the first instance by the legislature or by a commission with delegated powers could not be the subject of judicial inquiry, why is it that rates established by the carriers themselves should be subjected only to judicial investigation and control?

In a certain sense and for certain purposes the reasonableness of a transportation charge presents a judicial question. Such a question arises when a rate has been paid which is claimed to be unreasonable and suit is brought to recover the excess. But a rate may be claimed to be excessive from the standpoint of the public, without regard to any instance of individual hardship, and that rate presents a legislative question. It does not follow, therefore, even if rate control goes no further than to require the discontinuance of unreasonable charges without undertaking to prescribe for the future, that a legislative tribunal is not the proper one to determine the controversy. The circumstance that courts may in some cases and to some extent consider and decide such questions is not at all inconsistent with the idea that they are essentially legislative.

The view I take and the distinction I draw may be indicated by an example. The present grain rate from Chicago to New York, established by the carriers, is 17½ cents per hundred pounds. Now, I do not believe it would be possible by competent evidence in a judicial proceeding to prove that this rate is unreasonable. On the

other hand, if public authority should fix that rate at 15 cents—the rate recently in force—either by direct legislation or through a commission, I do not believe it possible for the carriers to prove by competent evidence that 15 cents would be confiscatory or in any way encroach upon their constitutional rights. Between these two rates there is a margin of two and a half cents which may be said to measure the sphere of legislative discretion. The courts might decide in a case within their jurisdiction that a given rate is not unreasonably high, but it does not follow that a lower rate on the same article imposed by public authority would be adjudged unreasonably low and therefore be restrained. In other words, a rate which the courts would not condemn in a suit to recover damages nor enjoin as the result of judicial inquiry, if that could be done, may be a higher rate in given circumstances than the public ought to be required to pay, just as a rate imposed upon the carrier which the courts would not condemn as confiscatory or for any other reason may be lower than the carrier should be permitted to charge.

It is both true and right that courts, generally speaking, decide the cases that come before them upon the legal evidence submitted and in accordance with settled principles of jurisprudence, and do not, as a rule, directly, if at all, take into account the economic consequence of their decisions. On the other hand, the legislature in determining whether existing rules of conduct shall be changed or new rules adopted is not controlled by evidence or by judicial precedent, but acts presumably upon the broadest considerations of public welfare. It is not too much to say that every controversy involving the adjustment of freight rates presents an economic problem whose solution should be determined with the view of promoting the largest public advantage consistent with the just rights of the carrier. The courts decide questions of legal right; legislatures consider, when their action is governed by intelligence, the probable effect of their enactments upon all the interests likely to be affected. These comments have reference to the distinct nature of the judicial function as distinguished from the legislative function. It is further to be observed that a scheme of rate regulation by the courts would doubtless be held unconstitutional, as numerous decisions affirm and as pointed out in the lucid opinion furnished by Attorney-General Moody to the Senate Committee. Therefore, from whatever point of view this matter is observed, it seems plain

to me that the questions here referred to are distinctly legislative questions and that the proper tribunal of regulation, whether its authority be greater or less, is legislative and not judicial.

Administrative Authority.

Having provided the needful code of substantive law and decided that it shall be administered by a commission and not by a court, so far as the regulation of rates is concerned, the next thing to determine is the measure of authority which the administrative body shall be permitted or required to exercise. Under the present law, as it has been interpreted, the commission cannot in any case determine what rate shall be observed in the future. It can only decide whether the charges fixed by the carriers conform to the standard of reasonableness and relative justice, and if found otherwise, direct their discontinuance. Whether the law shall be so amended as to authorize the commission, after investigating a complaint upon notice and opportunity to be heard, to prescribe the future rate in that case, if the complaint is well founded, is the stoutly controverted question. I do not undertake to discuss this question for I can add nothing to what has already been said. Besides, the purpose of this paper is to outline certain principles of regulation rather than to argue for an increase of official authority. I am firmly convinced that the agency entrusted with the enforcement of such rules of conduct as may be enacted in relation to rates should be a commission and not a court, whether the authority devolved upon the regulating tribunal be limited to the present or extend into the future. I realize that the power to decide, even in contested cases and subject to judicial review—which is all that is proposed and even more—what rates shall be charged in the future is a very important power and involves grave responsibility. Personally, as a member of the commission, I do not covet the exercise of that power and should welcome some other adequate solution of the question at issue; but how can any other plan be relied upon to provide proper and sufficient control over railroad rates and practices? The argument for denying such control virtually admits, as it seems to me, that the freedom of the carriers to make such obtainable rates as they may deem for their interest is not to be materially abridged. However far-reaching may be the proposal to invest a

commission in any case with actual authority over future rates, is not the denial of that authority, to be exercised by a legislative tribunal, a far more serious proposition?

Effect of Administrative Action.

One further observation. If an administrative tribunal rather than a court is the selected agency for enforcing the enacted rules of conduct in respect of rates, whatever be the extent or degree of its authority, the orders which it is empowered to make should be self-enforceable and not as now only *prima facie* findings for the purpose of legal proceedings. It is not sufficient or suitable that the administrative body charged with the duty of giving effect to the regulating statute, and exercising such authority as the Congress may confer, should be obliged, when its directions are disregarded, to become a suitor in the courts to enforce its own determinations. When the commission has investigated and decided, when it has promulgated such an order as it may be authorized to make, its duty in the premises should be fully discharged and ended. Subject to such judicial review as will protect against the abuse or unreasonable exercise of delegated authority, the lawful directions of the regulating tribunal, unless restrained or set aside by the courts, should take effect and be obligatory substantially the same as legislative enactments. Whether it be deemed sufficient to provide only for condemnation and orders of desistence, or whether in addition authority be bestowed to prescribe for the future, however much or little the power with which administration is invested, the legislation should be so framed as to compel the carrier to comply with an authorized requirement or to resort to the courts for its suspension or annulment.

Therefore, as I conceive, the problem of enacting or amending laws for the regulation of interstate carriers includes the four elements which I have thus briefly described. To my mind they are quite distinct and separable as I have endeavored to explain. Each presents its peculiar phases and furnishes its special field of controversy. The task of legislating upon this subject is difficult and the need urgent. It cannot be doubted that a correct analysis and clear apprehension of the principles involved will aid a wise and useful outcome.

LIMITATIONS UPON NATIONAL REGULATION OF RAILROADS

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This paper is written from the point of view of those who are engaged in the management of the railroad business. For convenience of treatment, the subject is divided into three parts: 1. The Extent of the Federal Power over Railroads. 2. Limitations by Economic Laws. 3. Limitations by Common Law.

I. *The Extent of the Federal Power over Railroads.*

The federal power over railroads is confined to their operations in respect to commerce with foreign nations, among the several states and with the Indian tribes. The courts have held that when an article of commerce begins to move from a point in one state to an ultimate destination in another state, or even to a destination in the same state, if it is to pass into another state in transit, interstate commerce with respect to that article begins. But there is still a very considerable movement of freight and passengers upon the railroads of this country which is confined within the limits of a single state and is entirely beyond the power of Congress to regulate.

Most of the equipment of nearly every railroad, however, is used from time to time in the movement of interstate commerce, and national regulations respecting safety appliances therefore include practically all the railroad equipment in the country.

Over that portion of the business of the railroads included in the term "interstate commerce," the power of Congress is absolutely exclusive whether actually exercised or not. Even in the absence of any enactment by the federal government the states are powerless to

enact laws which would amount to a regulation of interstate commerce.

The Supreme Court of the United States has said that the non-exercise by Congress of this power in respect to the regulation of commerce among the states is equivalent to a declaration that such commerce shall be free from any restrictions or impositions. The power to regulate has been held also to include power to prohibit commerce among the several states in cases where commerce affects injuriously the public welfare, as in the case of the sale of lottery tickets.

Aside from provisions for the general welfare of the public and the employees of the railroad companies found in the requirements respecting the instrumentalities of commerce, the federal regulation is most influential upon the rates which may be charged for the transportation service. Congress, undoubtedly, has power to prescribe reasonable rates for such transportation, either maximum, minimum or absolute. The magnitude of the problem as it is presented in this country and the manifest difficulty of dealing with it in a deliberative body so large as the Congress have naturally suggested the assignment of the labor to a commission; but the provision of the Constitution is that *Congress* shall have power to regulate. The fixing of rates is a legislative function and it is a well settled rule of law that Congress may not delegate its legislative functions to any subordinate board or body. The question arises whether Congress may delegate to a commission the power to prescribe transportation rates,—whether an act purporting to confer such power upon a commission would not be void as being an attempted delegation of a legislative function entrusted by the Constitution to the Congress.

The authorities agree that Congress may prescribe certain rules which shall be applicable to certain conditions and entrust to some executive officer or administrative board the determination of the question whether those conditions are present in a given case. Congress, for example, may authorize the President to suspend, by proclamation, the free introduction of certain commodities from a country which does not afford reciprocal treatment to our products, leaving to him the determination of the question of fact, whether the treatment accorded by such country is in fact reciprocal. Such an act was held not to be a delegation of legislative power and there-

fore not unconstitutional. (Field *vs.* Clark, 143 U. S., 649.) Or, Congress may leave to a board of inspectors the determination of the question whether teas presented for import are of inferior grade within the meaning of the act. (Buttfield *vs.* Stranahan, 192 U. S., 470.) But, if the act purports to transfer to a subordinate board or body any function which is properly legislative in its nature, whether its exercise be limited or unlimited, it should be held to be void.

It would not be permissible for Congress to confer upon a commission the power to fix transportation rates for the future, subject only to the limitation that such rates should be "reasonable." Such an act should be held void as a delegation of legislative power. It would be permissible for Congress to pass an act declaring that transportation rates should be reasonable, and conferring upon a commission, subject to a judicial review, the power to determine a maximum rate, any increase of which would be extortion, and a minimum rate, any decrease of which would be considered confiscation. But between these two extremes, Congress alone has the power to exercise the federal authority to prescribe.

The term "reasonable" as used in the law on the subject of rates for *quasi* public service is intended to define rates which are not so high, when considered from the point of view of the public with reference to the value of the service rendered, as to amount to extortion, and on the other hand are not so low, when considered from the point of view of the carrier with reference to the return upon the investment, as to amount to a taking of property without due process of law or confiscation. Between these two extremes, there may be, and usually is, a considerable latitude within which rates may be raised or lowered and still be reasonable. If Congress declares that the rates shall be reasonable, it simply declares that they shall not be so high as to amount to extortion, nor so low as to amount to confiscation, and it would be competent to commit to a commission the power to determine, subject to judicial review, the question whether a given schedule is outside the limit or not, in other words to fix the maximum and the minimum. But it would not be competent for Congress to give to any commission absolute discretion to fix the rates for the future within these limits of reasonableness, for that would be a delegation of legislative power and absolutely beyond the jurisdiction of the courts to review. The judicial power to review legislation on this subject extends only to relieving

the carrier from rates which amount to confiscation, or the shipper from rates which amount to extortion; but in the review of the action of a commission fixing maximum and minimum rates the judicial arm of the government would guarantee to the carrier a rate which would be measured by the fair value of the service rendered and any maximum rate thus fixed below that point would be set aside. If the lowest rate for a given transportation service which would allow the carrier a fair return upon his investment is eighty cents and the highest which would not amount to extortion is one hundred cents, the Congress might prescribe a rate of ninety cents, but a commission exercising a power to fix maximum or minimum rates could not lawfully adopt ninety as the minimum and ninety as the maximum. The courts would review such a proceeding and upon a proper showing would set it aside.

We are not unmindful of a number of decisions of the Supreme Court of the United States, which are cited as giving support to a different view, but we do not so understand them.[1]

II. *Limitations Imposed by Economic Laws.*

There are certain limitations upon the exercise of the power of the government to regulate railroad rates which must be observed in the formulation of any statute designed to regulate rates. It is a common opinion among those who listen with approval to declamations in favor of government regulation of railroad rates that at the present time the rates for the transportation of freight by railroads in this country are prescribed by the traffic managers at will and that there is nothing to prevent their increase to almost any extent. This opinion is erroneous. Traffic managers of the railroads of this country do not make rates at will. There are at least two classes of limitations by which they are at all times controlled: (*a*) Limitations by economic laws; (*b*) Limitations by common law.

The first class of limitations upon the power of the traffic managers of the railroads of this country over rates is imposed by economic law. Any attempt at regulation of railroad rates by Congress which does not observe these limitations will be certain to fail to

[1] Stone *vs.* Farmers' Loan and Trust Co., 116 U. S. 307; Reagan *vs.* Farmers' Loan and Trust Co., 154 U. S. 362; Interstate Commerce Commission *vs.* C. N. O. & T. P. Ry. Co., 167 U. S. 479.

satisfy the country as a whole, and if enforced and persisted in will do more harm than good to the commercial interests of the nation. The law to which we refer is the law of competition in trade.

In the first place, we must not lose sight of the very great variety of articles of commerce which are offered to the railroads for transportation. Some combine great value with very small weight or volume, while others combine great weight or volume with little value. Some are perishable. Some are frail. Some are alive. Some are dead. Some require two or three cars coupled together to support them, while others need no car at all but move upon wheels of their own. Some go on flat cars exposed to the storm; others will spoil if they are not kept dry. Some are so combustible that they cannot be placed near the engine. Some are explosive and will be discharged by rough handling of the car. Some must have water in transit and some must have ice, and some must be accompanied by an attendant.

These considerations and others, which might be mentioned, necessitate classification of freight; and classifications have been made in which some ten thousand different commodities which are from time to time offered to railroads for transportation, are named and classified; and such classifications are in force all over the country.

But classification of freight overcomes only a few of the difficulties which confront the rate-makers. Railroad business differs from almost every other kind of business in that it is not the carrier that can render the service with the least expense to itself that offers the lowest rate. If a railroad has been built between two points which furnish business sufficient to enable it, with reasonable rates, to pay operating expenses and a dividend, it is considered that any additional business which it may be able to secure, even though it may divert it from some other carrier having a direct route, is almost clear profit. It therefore happens that nearly every railroad company, in addition to what may be called its legitimate business, attempts to secure, by joint arrangement with its connections, traffic between points which are reached by it with its connections, not in a direct line but in a roundabout route, and in order to secure such traffic it offers rates much below what would be considered "reasonable" for the business which naturally belongs to it and which it is best qualified by reason of location to handle, and offers rates also

much below what the owners of a more direct route will demand for carrying the business. It often happens therefore that a railroad company having the shorter line between two important points may be compelled to meet the competition of a number of connecting lines constituting a route which is much longer and far away from the direct line.

The Michigan Central has a joint rate in force from Detroit to East St. Louis, and also to East Fort Madison, both being Mississippi River crossings. The rate to East Fort Madison is higher than the rate to East St. Louis, and that higher rate is applied to traffic destined to East Fort Madison. If, however, the traffic is destined to Omaha, the lines by way of East St. Louis will compete for the business and the carriers reaching East Fort Madison therefore publish another lower rate to that point for traffic destined beyond, which does not exceed the rate to East St. Louis. This lower rate is called a proportional rate.

Then there may be situated on the line of a railroad an industry making use of large quantities of raw material, all coming from some particular mine or quarry from which this particular industry takes the entire output. Here will be an extensive traffic in one particular commodity between the mine or quarry and this one industry, with which no other traffic comes into competition, and the carriers have found it advisable to publish a special rate for such business, known as a commodity rate. A number of articles, such as grain, coal, live stock and dressed meats, which move in very large quantities in one direction are handled upon a commodity rate.

It sometimes happens that a territory served by a carrier may have a product, peculiar to that territory, which seeks a market far away, and instead of making rates on that product varying with each station in the territory, it has been deemed fair to establish a rate which shall apply to all the stations in the territory, so that all within that district may sell their product at the same price and receive the same net proceeds after payment of the freight. Such rates are called group rates and they are quite common in some parts of the country.

The cost of water transportation from Chicago to New York is made the basis for the determination of the rates between the Atlantic seaboard points and a very large portion of the country; the rates to other points, by concerted action on the part of the

principal carriers, being made a certain percentage of the Chicago rate. Thus the rate from New York to Cincinnati is 87 per cent. of the Chicago rate; to St. Louis, 116 per cent.; to Louisville, 100 per cent.; to Cleveland, 71 per cent.; etc. In some sections of the country the areas of these groups are defined, bounded and published upon a map which is placed in the hands of the traffic managers of the interested roads. The groups vary in size and their area is regulated by commercial conditions.

These various classes of rates, as well as the classification of freight, are made necessary by commercial considerations, and result from the laws of trade which must be given effect and recognition in any attempt at national regulation.

The plan of grouping has been objected to as denying to the producers in some parts of the territory included in the group, the advantage to which their location, that is, their proximity to the market, is supposed to entitle them; and it is likely that if the government should attempt to prescribe rates, there would be an effort made to have the group system abandoned. But it has been demonstrated in the experience of Germany that it is for the best interest of the nation to put the entire territory upon an equal footing as far as possible, rather than to allow to each farmer some advantage in freight rates over his next neighbor who may live a short distance farther away from the market, because of his geographical location. In other words, rates must be such as to stimulate production and at the same time move the product. In Germany, where they have had government ownership of railroads since 1879, the government prescribed a rate on grain of a certain sum per ton per mile, regardless of the distance moved and regardless of all other conditions affecting the grain trade. The result was that grain could not move by rail from eastern Germany, where it was raised in large quantities, to western Germany, where the demand was greatest, but was compelled to seek an outlet by a devious water route with a short rail haul at both ends of the line. In 1888 the farmers of eastern Germany demanded a reduction of the grain rate so as to permit them to move it by rail, but the demand was refused on the ground that a reduction would have a tendency to raise the value of farm land in eastern Germany and deny to the farmers in western Germany the advantage to which they were entitled by their geographical location. In 1891 there were serious

crop failures which brought great hardship upon the laborers in western Germany, and the government was constrained to reduce the rate on grain for distances over one hundred and twenty-five miles, and a sliding scale was put in force which afforded some relief and permitted the grain from eastern Germany to move into the western portion of the empire by rail; but the rate was still much too high and much more than the traffic would bear. The farmers of southern and western Germany protested that they were being deprived of their geographical advantage and when, in 1894, the government desired to make a commercial treaty with Russia, the southern provinces, whose representatives held the balance of power, refused to assent to it unless the rates on grain were changed. The Russian treaty was very important and so an order was issued restoring the uniform rate on grain of a certain sum per ton per mile, regardless of the length of the haul. The result was that the treaty with Russia was promptly authorized.

At the same time, there was a tariff on grain of $8.75 per ton and all grain imported into the German Empire was required to pay $8.75 to the government, so the government allowed to the farmers of eastern Germany a bounty of $8.75 per ton on all grain exported, to enable them to realize the same price for their grain that the farmers in western and southwestern Germany received, the latter price being regulated by the cost of imported grain at the border, plus the tariff.

This illustrates the result in Germany of a government regulation of rates which does not recognize the necessity of limiting the rate to what the traffic will bear, but rests upon the principle that each community is entitled to the advantage resulting from its geographical location.[2]

If the strict rule of making the rate per ton per mile the same for every movement, whether the haul is long or short, be modified by adopting a sliding scale, it necessarily follows that commodities can be moved from the place of production to the market for much less if they go in a single through shipment than if they go to an intermediate dealer and are then reshipped by him. The total charge for a long haul will be less than the total charge for the movement to the same destination by means of two shorter hauls. This tends

[2] See testimony of Prof. Hugo Meyer before the Interstate Commerce Committee of the United States Senate in 1905.

to centralize trade. Under the system of rate making in this country with the privileges of stop-over and reshipment at the balance of the through rate, and the basing point system, the jobber in the interior is able to compete with the shipper at the seaboard; merchants far removed from the point of production of the commodity they handle are able to sell in competition with dealers residing in the locality where the commodity is produced; and our group rates extend the markets for the products of our enterprise.

We often hear the expression that the railroads have "annihilated distance" in this country. It is the system of rate making that has annihilated distance, and it is the annihilation of distance by the system of rate making of the railroads that is responsible very largely for our tremendous industrial development. In Germany, the railroads do not have that effect because their system of rate making does not recognize the laws of trade and competition. Suppose there had been maintained in this country for the last forty years, under government regulation, a system of strictly distance tariffs, there would have been no substantial industrial development in the states between the Mississippi River and the Rocky Mountains. The reduction of rates on grain from the prairies to the East, to a point where they would stimulate production and move the product, resulted in a reduction in the value of farm lands in the New England and Middle States and an increase in the value of farm land in the West, but this has not proved to be destructive to the industrial growth of New England and the Middle States. The increase in the farm values in the West has induced immigration to these farms, and the consequence has been a wide extension of the markets for the manufacturers of the East. The policy of the rate makers has been to build up the industries on their respective lines by making rates, as far as possible, that would permit the products of those industries to be sold far and wide in competition with similar products of industries situated in remote parts of the country.

It may be said that this is no argument against government regulation. We do not make the statement primarily as an argument against government regulation. What we do say is that any effort at government regulation must recognize these principles and follow the plan which the railroads themselves have adopted, or it will do more harm than good. But it is hardly likely that the government will be able to regulate rates comprehensively, with as

much success as the railroad managers themselves. Two great forces which control the rate makers to-day are: (1) the desire to stimulate production along their respective lines, and (2) the contest of trade centers for supremacy. These are competitive forces of a powerful nature, and any governmental body which should undertake to fix all the rates for transportation in this country would probably be compelled to ignore the first, and would be likely to be accused of being influenced by political considerations, if it undertook to give any recognition to the second.

III. *Limitations by Common Law.*

We have said that there are two classes of regulations which control the rate makers of this country, the first being limitations by economic laws. Another class of limitations is made up of those imposed by common law.

It has been the rule of the common law from time immemorial that when one devotes his property to a use which is of such a nature, by reason of public aid in its investment or by reason of the monopolistic character of the service rendered, that it is said to be impressed with a public interest, he is bound to content himself with charges that are reasonable. So, if a man erected in a harbor a wharf or crane which by reason of a grant of public aid in its construction, or by reason of the fact that there was no other crane in the harbor, could be said to be impressed with a public interest, it was held that he must limit his charges to such as would constitute a reasonable reward for the service rendered. In comparatively modern times and particularly in this country in the period of the Granger cases, there was an attempt to regulate charges for public utilities by legislation and it has been held to be a rule of common law that while the charges for such public utilities must be limited to such as constitute reasonable compensation for the services rendered, at the same time they may not be reduced by legislation to a point below what will yield a fair return to the owner upon his investment. The existing national legislation upon the subject of rates has done little more than to declare the principles of the common law, which are more than two centuries old. And after all, reasonableness is really the sole test of the validity of a rate for transportation by a common carrier. This is the limitation to which we now refer,—that rates shall be reasonable.

It becomes important to inquire what are the considerations which control in a determination of the question of reasonableness. We have already noted the fact that there may be a wide range of rates for the performance of a given transportation service within which any rate charged will be held to be reasonable. The lowest will be the minimum and the highest will be the maximum. The question of what is the minimum rate which will be held to be reasonable, generally arises upon the complaint of the carrier, while the question of what is the maximum rate, usually arises on complaint of some customer of the carrier, or on complaint of some public officer, and the considerations which control in determining the two questions are as far apart as the different points of view.

First, then, in a review of legislative action, what will be held unreasonable upon complaint of the carrier? What is the minimum?

It has been held by the courts that a railroad company is entitled to charge rates which will enable it to pay its legitimate operating expenses, taxes, the cost of maintenance, and interest upon money borrowed and actually devoted to the enterprise, and some return upon the investment represented by the capital stock. Some cases hold that the carrier is not only entitled to all these things and *some* return upon the investment represented by the capital stock, but a *fair* return.

It may happen that the property devoted to the enterprise at the time of the investigation of the question of the reasonableness of the rates may be worth much more than it originally cost, or much less, and some courts hold that what the carrier is entitled to is a return upon such value at the time of the investigation, regardless of the original cost.

In the application of any of these rules difficulties are likely to be encountered, for it is uncertain what deductions are to be made from the gross earnings on account of operating expenses and maintenance, and it is also uncertain how we are to determine the actual amount of money borrowed and devoted to the enterprise and how we are to determine the amount of actual investment represented by the capital stock; and if we adopt the other rule, allowing value to determine the investment, it is not clear what method is to be employed to measure the value. When a proper method has been adopted for the determination of the extent of the investment, it should be held, upon the complaint of a carrier, that he is entitled

to a fair return upon his investment. This fixes the minimum of reasonableness.

Second, in a review of legislative action, what will be held unreasonable upon the complaint of a shipper? What is the maximum?

Upon the complaint of a shipper, the net revenue of the carrier has nothing to do with the determination of the question of reasonableness. No shipper has the right to complain of a rate or a schedule of rates simply because the carrier is able to pay large dividends. As long as the rates charged do not exceed the value of the service rendered, the shipper has no right to complain; and the value of the service rendered is determined by commercial considerations, one of which is the cost of the service. Shippers are apt to forget that there has been for a number of years in this country a general upward tendency in the wages paid to the men and in the price of almost all kinds of supplies. Higher speed is demanded. Better accommodations for passengers are being constantly provided. Expensive safety appliances have been required. All these tend to increase the value of the service, and yet there are few persons who are willing that there should be any corresponding increase in the rates. On the contrary, there is a constant tendency downward in passenger rates wherever they are subject to state regulation, and the slightest increase in the average freight rate per ton per mile in the United States taken as a whole and averaged for a year, is viewed with suspicion and furnishes a text for an outburst of passion against the railroads. Upon the complaint of a shipper it should be held that the carrier is entitled to the fair value of the service rendered. This fixes the maximum.

A correct judgment as to the value of the service rendered in any given movement of freight depends upon the commercial conditions surrounding the movement, and it often happens that a complaint that rates are unreasonable may require for its proper adjudication a careful inquiry, not only into the business of the road that makes them, but also into the business of other roads, whose rates are supposed by comparison to show the injustice of the rates complained of.

Between these two points: the rates which will yield a return upon the investment as the minimum, and the rates which will not exceed the value of the service rendered as the maximum, there may be, and often is, a wide range, within which the carrier is at

liberty to prescribe the rates under the full protection of the law. And within this range it has been judicially determined that carriers are justified in charging less for a long haul than for a shorter haul over the same line in the same direction, the shorter haul being included within the longer distance, in cases where competition controls the rate to the longer distance point; and that carriers may charge less for the inland portion of the transportation of export or import freight than is charged for a similar movement of domestic freight.

It is probably true that these practices, both of which have been sustained by the courts, constitute the real basis of a great majority of the supposed grievances of which the shippers complain, but these practices are forced upon the carriers by trade conditions, and they are practices which distinguish the railroad business of this country from the railroad business in a country where trade conditions are ignored by government regulations, and where railroad construction and development is practically at a standstill. These are the practices which annihilate distance and tend to decentralize the population. The prohibition of these practices by a statute, upon the demand of the persons living nearest the great markets that they should be given the advantage to which their geographical location is supposed to entitle them, would stop the development of the interior and cripple the railroads and would produce restrictions upon the revenue of the carriers, which in many cases would probably be held by the courts to be unreasonable; and would impose, in other cases, rates beyond what the traffic would bear.

The present adjustment of railroad rates is most complicated, but it is the result of the operation of economic laws. The railroad managers have not made rates for the transportation of freight at will. They have been forced to limit the rates to what the traffic will bear,—using that expression, not in the offensive sense, as a description of a maximum of burden to which another straw could not be added without disaster, but in the sense in which it is used among traffic managers, as representing a rate which will stimulate production and move the product and at the same time yield a fair return to the carrier upon his investment in the enterprise. Rates thus adjusted will stand the judicial test for reasonableness, and no state or federal authority should deprive the carrier of the revenue which such rates will afford.

FEDERAL CONTROL OF INTERSTATE COMMERCE

By Harry Earl Montgomery,
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The Republican administration, voicing the demand of the American people, has determined to give to the federal government power to regulate and control corporations engaged in interstate commerce. The various plans presented and the bills introduced at the last session of Congress have been criticised so severely by students of economics that the first lesson in remedial legislation is being learned,—the lesson of what not to do. So clearly have the defects of the proposed remedies been shown, that a straight and narrow pathway is appearing which will lead, unless blocked by political or other influences, to the passage of a law which will preserve the good features and at the same time eliminate the evils now existing in corporations engaged in interstate trade.

The bidding of the states for the chartering of corporations has created a body of laws which confer great powers—powers our forefathers never dreamed would be given to any group of individuals—to those who are willing to pay a small incorporation tax in exchange for such privileges. So little supervision and control are now exercised by the state governments that corporations are able, through the secrecy which surrounds their actions, to override the law and to some extent to be creatures subject only to the wishes and desires of the corporate managers. The futility of state control has become so apparent that, much against their wishes, our people are compelled to turn for protection to the federal government.

The constitution of the United States, by the third clause of Article 1, Section VIII, has reserved to Congress the power "to regulate commerce with foreign nations and among the several states," and has thereby vested in Congress the power to enact laws which will adequately control and regulate the agencies engaged in interstate trade. So well convinced are the authorities at Wash-

ington that Congress possesses such power, that Commissioner Garfield, of the Bureau of Corporations, in his first report, has said, that "It may be considered as established" that under these constitutional powers Congress may:

(1) Create corporations as a means of regulating interstate commerce.

(2) Give to such corporations the power to engage in interstate or foreign commerce.

(3) Prohibit any other corporations or individuals from engaging in the same.

(4) As a condition precedent to the grant of such corporate powers, lay any restrictions it chooses upon the organization's conduct or management of such corporation.

(5) Tax interstate commerce at will and the instrumentalities and corporations engaged therein.

(6) Provide regulations for the carrying on of interstate commerce generally and in such local affairs as are now left to the states in the "silence of Congress" under the principle established in Cooley *vs.* Port Wardens (12 How. 299), and in the carrying out of such powers it may use any or all means "which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution."

Congress having the power to act and the administration having determined that such power shall be used to the curbing of corporate greed and corporate discrimination, it becomes the duty of every American to give his best thought to the consideration of the plans suggested in order that the combined wisdom of the American people may be brought to bear on the preparation of a federal incorporation act. To such an end the following plan is presented as a contribution to this discussion:

First. The power and authority of the Bureau of Corporations in the Department of Commerce and Labor should be enlarged so as to include the right to grant charters of incorporation to all who seek to engage in interstate or foreign commerce. This bureau should not only have this power, but all corporations, joint stock companies and other forms of organizations now existing or which hereinafter may be chartered by a state government, should be prohibited from engaging in interstate and foreign commerce until chartered by this bureau. Unless this bureau has the sole right to

incorporate associations engaged in interstate or foreign commerce, the effect of this plan would be defeated. Sub-companies would be organized in the different states, with or without the intervention of a holding company, and would not be subject to the control and regulation of this bureau.

This bureau should have not only the sole right to incorporate associations engaged in interstate and foreign commerce, but it should have absolute charge and complete control of its corporate children.

Second. Every corporation incorporated by this bureau should pay an organization tax of one-tenth of one per cent. upon the amount of capital stock authorized, and a like tax upon any subsequent issue.

The average organization tax in the various states is about one-tenth of one per cent. Experience has shown that this is the rate which incorporators are willing to pay for the privilege of owning a corporate charter and the amount that should be charged for giving such privilege.

The incorporation tax should be so low as to deter no group of men from carrying on business in a corporate capacity; for it is to corporations, with their large aggregation of capital, that we must look for the development of our country. Corporations, when backed by large capital, expert skill and great business ability, have often conferred material benefit on the community at large, and almost invariably insured the promotion of prosperity on a durable basis. They have furnished the people with many of the commodities of civilized existence at much lower prices than formerly, not only without decreasing the wages of labor, but in many instances increasing them, and eventually extending the field for a larger number of employees. India rubber goods, tobacco, leather and a great variety of other commodities are cheaper than at any former period of our country's existence; and wages are higher to-day than they have ever been, except in war times. Without corporations the great railway systems of our country could not have obtained the capital required to cover our land with a network of rails and could not carry freight and passengers at the low rates charged to-day.

Without corporations our manufacturers could not compete with the corporations of England, France and Germany in the race

for the Asiatic and the South American markets. To extend our markets, and thereby provide an outlet for our surplus products, and thus give constant employment to our workers and toilers, is the crying necessity of our economic life; and, in order to obtain these markets, giant corporations must be met and conquered by more powerful and far greater aggregations of capital, organized in the form of corporations.

Third. The stockholders and directors of corporations organized under the Corporation Bureau should be personally liable only to the following extent:

The stockholders should be personally liable,—

(*a*) To creditors, to an amount equal to the amount unpaid on the stock held by each stockholder.

(*b*) To the laborers, servants and employees other than contractors, for services performed by them for such corporation.

The directors should be personally liable,—

(*a*) For declaring dividends from any fund other than from the surplus profits arising from the business of the corporation.

(*b*) For loaning corporation money to any stockholder, or consenting to the corporation discounting any note or other evidence of debt.

(*c*) For violating any of the provisions of this act or any law of the United States.

The liability of stockholders and directors of corporations, except for violations of law or breach of trust, should be so limited as to deter no one from contributing his money to corporate enterprises. The provisions of this plan provide sufficient protection to creditors and to the general public, and no additional burdens to those hereinbefore set forth need be placed on corporate stockholders and corporate directors.

Fourth. The real and tangible personal property owned by corporations chartered by this bureau should be locally assessed and taxed in the civic divisions of the states in which the property is located, the same as the real and personal property owned by individuals. No higher or different rate of taxation and no other or different method of assessment should be applied to such corporations than is applied to corporations organized under the state law or to individual citizens.

The reason for such local taxation is twofold: First, the local

authorities have a better knowledge of the value of property and better facilities for obtaining this knowledge, and would, therefore, make fewer mistakes, than a board of examiners appointed from Washington and not residents of the locality where such property is located; secondly, the cities and counties of the states depend largely for their support upon the taxes levied upon the property of corporations located within their jurisdiction, and to withdraw this revenue would cause confusion and would increase the burdens of the local taxpayers.

Fifth. Every prospectus or advertisement issued or published with a view of obtaining subscriptions for shares or for bonds of a corporation, organized or to be organized by this bureau, should give full details as to its organization; the contracts into which the promoters or organizers have entered; the earnings for the two previous years of all underlying corporations; the amount of money to be used for preliminary expenses and the amount to be reserved for working capital; and all information necessary for safe and intelligent investment. For a false statement, or the issuing of a prospectus which does not make a full disclosure of the corporate affairs, the promoters and their associates, the officers and their agents, should be legally liable, both civilly and criminally.

This knowledge is at present inaccessible. The investor who puts money into a giant corporation must guess as best he can what property he is getting, and the guess is often a bad one for him. The making public of the above-mentioned facts will remove the gravest evils from stock-watering. If the investor knows that there is only one dollar of property back of every three dollars of stock and bonds, which is the case with so many corporations whose shares are listed at the exchanges to-day, he can buy the securities at a discount sufficient to make his investment safe.

When appeals are made to the public to subscribe to the capital of undertakings, it should be made obligatory on the corporate promoters, organizers and officers to disclose every fact known to them and unknown to the public, in order that everything be open and above board, and the parties, public and promoters alike, may deal with equal information in regard to the organization and the conduct of such companies.

Corporations now in existence and engaged in interstate or foreign trade, and desiring to obtain a charter from this bureau,

should furnish to the commissioner a detailed history of its organization and an itemized list of its assets and liabilities, a summary statement of which should be published in such newspapers as may be designated by the commissioner. By the possession of this report the bureau will be placed in the position by which it could investigate intelligently the affairs of the corporation and be able rightly to supervise its future corporate life.

Sixth. Every corporation should annually, during the month of January, make and file with the corporation department a statement as of the first day of January, verified by the oath of its president or vice-president and its secretary or treasurer, fully setting forth the following information:

(1) The name of the corporation and the place and date of its incorporation.

(2) The names, residence, and business or occupation of the officers and directors of the corporation.

(3) The business in which the corporation is actually engaged, and the states, territories, districts, or insular possessions in which it is engaged in transacting such business, specifying a person residing in each such state and territory, who shall be designated by such corporation as its legal representative upon whom service of any legal process or notice issuing out of any court or of the corporation department may be made.

(4) The cash value of the assets of the corporation and the nature and character of such assets.

(5) The amount of indebtedness of the corporation, and, if such indebtedness is secured, in what manner.

(6) A statement in detail of all bonds and mortgages issued by and outstanding against said corporation, showing when said bonds were issued, when the same become due, and the consideration received by the corporation for said bonds in property or money, and, if in property, the nature, situation and cash value of such property; and in case of mortgages, a statement showing the date of such mortgages, the date of their maturity, the property covered thereby, and the cash value thereof.

(7) The amount of shares of stock or bonds owned or controlled by said corporation in any other corporation, and the proportion of the entire capital stock which such holding represents, both in the reporting corporation and the corporation whose shares it holds.

(8) The amount of assets and liabilities of any corporation in which such reporting corporation holds stock or bonds, giving the character of such assets and liabilities and of what such assets and liabilities consist.

(9) The number of shares of the capital stock of the corporation which have been actually issued, and the amount and value of the consideration actually received into the treasury of the corporation for such shares; where the payment was made in money, then the amount in money per share; where such payment was made in property, a description of such property as to location, character, and the cash value thereof.

(10) That it is not a party to any contract or agreement for the purpose of, or which operates as, a restraint of trade or commerce, or which results in giving to either corporation a monopoly of trade in any article of common use or utility, or which results in any business or commercial advantage over other corporations or persons engaged in like trade, business, or commerce, by virtue of such agreement or contract. That it is not a party to any pooling plan, agreement, or contract with any other corporation for any purpose which, when carried into effect, would create a monopoly of the trade or business in which such corporation or corporations is engaged, or in any degree lessen or destroy competition between corporations or between corporations and natural persons engaged in business, trade, or commerce of a similar character.

(11) That no part of the capital stock of the corporation is owned, controlled, or voted by any other corporation, or by the officers of any other corporation.

(12) That the corporation does not have or receive any rebate, deduction, discrimination, drawback, preference, or advantage in rates of transportation or anything incident to such transportation from any common carrier—railroad, pipe line, water carriers or other transportation company—by which its products are or may be transported, which give to it any advantage or profit directly or indirectly as against any other person or corporation who ships or desires to ship products of a similar character over such transportation lines under like conditions; or if any such have been received or given, then such corporation shall state when, from whom, on what account, and in what manner it was received, making a detailed exposition of the entire transaction.

(13) If a corporation is a railroad or transportation company, or a common carrier of any kind, that during the past year it has not granted to any person or persons, corporation, or company any special rates, discriminations, advantages, or preferences whatsoever, neither has it received any such.

That if at any time a corporation, organized under the federal government shall fail to file its annual report as herein provided, or shall fail to give the information required, its officers should jointly and severally be personally liable to the United States in the sum of one thousand dollars per day for every day it transacts business; and if any such report shall contain a false statement, the officers making such false statement should be subject to a fine or imprisonment, or both.

The object of compelling the making and filing of this annual report is to put on record under oath two of the officers of the corporation in order that the department may have an additional hold on the responsible heads of the corporation for violation of law. The annual examination hereinafter provided will enable the department to verify the correctness of the report and thus ensure the truthfulness of the statements contained therein.

Seventh. The commissioner or head of this bureau, through his staff of examiners, should examine annually into the affairs of all corporations chartered by his department, inspecting their books, agreements, receipts, expenditures, vouchers, records of meetings of directors and of stockholders, and report the condition of their affairs as of the first of January of each year. Power should be given to compel the attendance of witnesses to be examined under oath, to call experts to testify as to values, and to require the production of all books, papers, contracts, agreements and documents relating to any subject under investigation, no matter in whose possession or in what part of the United States or of its dependencies such documents may be. The claim that any such testimony or evidence may tend to criminate the person giving such evidence or testimony should be met by a provision that any such evidence or testimony should not be used against such person on the trial of any criminal proceeding. But no person so testifying should be exempt from prosecution and punishment for perjury committed in so testifying. And if it should be found that a corporation is overcapitalized, or is violating any anti-trust or other law, the commis-

sioner of the corporation bureau, after giving to the corporation sixty days' written notice to comply with the laws, should place the evidence in the hands of the Attorney-General, who should immediately commence an action to annul its charter.

The commissioner should also have the power to compel corporations to furnish, from time to time, such statements in regard to the conduct of the corporate business, the change of stock interests, the financial condition of the company, and such other data as may, in his judgment, be necessary to a complete understanding of the business and the condition of the corporation.

A detailed report of the examination of the property, business, profits, and losses of every corporation chartered by this bureau, should be made each year and kept on file in the office of the commissioner. A summary statement of the corporate assets and liabilities, the amount of stock issued and the amount paid thereon, in cash and otherwise, the actual amount of surplus, and the nature and mode in which it is used and invested, should be published in a government paper, designated for that purpose, and in one newspaper published in the county where the principal place of business of such corporation is located. The publication of such facts would in no wise injure the corporation, while the publication of a detailed report might paralyze or destroy the business done by corporations. It is well known that a corporation, just as a partnership or an individual in business, in some years makes money, in some loses money, and in others comes out even, but in the average comes out ahead. If the creditors found at the end of a year that a corporation had lost money, how long would it be before the credit of that corporation would be lost; how long before the banks would refuse to renew or to discount its paper; how long before the creditors would place their claims in judgment and force the corporation into a receivership or into bankruptcy? Great care should be taken to protect amply the rights of privacy, while at the same time care should be exercised to protect the public by giving out such facts as they, as creditors, stockholders and prospective investors, are entitled to know.

The first concern of the government which grants charters of incorporation ought to be to see that its corporate offsprings are doing a legitimate business and are not violating any of the laws. Its second concern ought to be the giving to the public of all such

information as should affect the reasonable judgment of a man in determining whether he should or should not invest in a particular concern.

These obligations on the part of the government are universally recognized, but the means to be employed to effect these ends are still a matter of keen discussion.

Experience has abundantly proved that it is not practicable to allow corporations to issue their own reports without the existence of a board of inspection to verify the truth of the statements contained therein. Such a plan of reporting, without such inspection and verification, has been tried by the various states, and the result has been that the reports, if not so meagre as to be of no practical value, are of so complex a nature that the majority of persons are incapable of understanding or properly appreciating them.

As a matter of fact, a government board of examiners is absolutely indispensable for the realization of compulsory publicity. With such a board, the affairs of each corporation would become known, and the purchaser of bonds and of stocks could rely upon the corporation bureau to see that corporations are not overcapitalized, and that they are doing business honestly and fairly and within the provisions of law. In this way the corporation, the purchaser of corporate bonds and of stocks and the general public will be protected.

If the so-called "tobacco," "leather," "whiskey," "ice," "sugar," "steel" and "shipbuilding" trusts had been subjected to the ordeal of a thorough investigation by expert accountants and their true financial condition laid before the public, a large number of serious losses would have been prevented from falling upon innocent and worthy people. The fact that industrials as well as railroad and transportation companies are possessed of double attributes, of public and private nature combined, opens the way to abuse of official power. The favored few in the inner confidence of the managers have advantages in the general market to which they are not justly entitled.

The investigation of the refunding committee of the Pacific railroads at Washington brought out the evidence from one of the principal witnesses that the books connected with the construction of the road had been burned or destroyed as useless trash, although they contained the record of transactions involving hun-

dreds of millions of dollars, a record which became absolutely necessary to a fair settlement between the government and its debtors. There was put in evidence the fact that a certain party in interest had testified before another committee that he was present when $54,000,000 of profits were divided equally among four partners,—himself and three others. None of the books of record containing this valuable information escaped the flames.

The investigation of various railroad corporations has shown that some of the managements have peculiar methods, if not delinquencies, in bookkeeping, which if they had received rigid investigation and the guilty parties had been held responsible for their acts, many of the great railway corporations would not have been wrecked during the panic of 1893-95.

Such annual inspection by a government board of examiners would prevent a repetition of these evils and would ensure the correctness of published reports and prospectuses, and would prove a check on the discriminations which have built up and destroyed so many corporations.

"Under the present industrial conditions," Mr. Garfield, in his report, says, "secrecy and dishonesty in promotion, overcapitalization, unfair discrimination by means of transportation and other rebates, unfair and predatory competition, secrecy of corporate administration and misleading or dishonest financial statements are generally recognized as the principal evils."

These evils would in a large measure disappear if the corporate managers knew that the government by an annual inspection would bring to light all their acts.

The government which gives to a group of citizens a charter of incorporation, a special privilege, an advantage they did not possess as individuals, has the right to know that the privilege is not being used unfairly and illegally. If a corporation is legally organized and is conducting a legitimate business, no injury will be done it by inspection.

Eighth. A progressive graded tax should be levied on the actual net profits of corporations chartered by this department above 6 per cent. Such tax might be graded as follows:

1-10 of the 1st per cent. above 6 per cent.
1-9 of the 2d per cent. above 6 per cent.

1-8 of the 3d per cent. above 6 per cent.
1-7 of the 4th per cent. above 6 per cent.
1-6 of the 5th per cent.. above 6 per cent.
1-5 of the 6th per cent. above 6 per cent.
1-4 of the 7th per cent. above 6 per cent.
1-3 of the 8th per cent. above 6 per cent.
1-2 of the 9th per cent. above 6 per cent.
6-10 of the 10th per cent. above 6 per cent.
7-10 of the 11th per cent. above 6 per cent.
8-10 of the 12th per cent. above 6 per cent.
9-10 of each per cent. of profits above 18 per cent.

Each corporation is rated according to the profits made. The corporate charter is valued exclusively by the prosperity of the corporation. A tax upon the profits would be governed by actual results and be equal in its effect upon different corporations, and be just in its general operation. Whether or not a corporation had a special privilege, in the nature of a monopoly given by the patent laws, by the tariff, by a special franchise, or by the control of the market, would make no difference in the laying of the tax. If a corporation possessed any of these privileges, it would be obliged to pay for each in proportion to its value, as evidenced by its earning power. A corporation should be permitted to earn a reasonable profit on its assets. If this permission were taken away, all incentive to carry on business would be killed, the affairs of corporations would be wound up, and the people would be compelled to face general disaster, the like of which the world has never known. That the percentage of profits allowed untaxed should be liberal, in view of the risk taken by the investor, no one would question. While four per cent. may be the average value of capital, we would suggest the allowance untaxed of six per cent. of actual net profits on the fair market value of the tangible assets of the corporation, as this percentage would be large enough to stimulate business and not so large as to work injustice between corporations chartered by this bureau and corporations chartered by the various states.

It is reasonable to assume that corporations will make all the profits they dare; and if we place a progressive graded tax upon their profits, their incentive to overcharge and increase their profits beyond a fair amount will be taken away, and their time, thought

and energy will be bestowed in bettering the quality of their products, in extending their markets, and in holding their place in the business world. Franchises, special privileges and tariff protection will not produce the valuable monopolies they are creating to-day, for upon the adoption of this plan of taxation the monopolies will not be allowed to yield the large profits that are now enjoyed. If a corporation has to pay as a tax 9-10 of each per cent. of profits above 18 per cent., it will not risk the losing of its trade for the sake of making so small a percentage of profit, and the people will get the benefit of a cheaper price and a better article.

Ninth. In determining the actual net profits earned by a corporation, the board of examiners should annually ascertain the fair market value of the tangible assets of the corporation, not taking into consideration the franchises, the capital stock, or its bonds.

This value may be obtained by an examination of the officers of the corporation, by inspection of its books, and by expert testimony. The board should deduct from the total earnings of the corporation the necessary and reasonable expenses of its management, including the actual amounts spent in renewing the plant, the cost of materials purchased and used, and, in order to avoid double taxation, the taxes paid on its property to all municipalities. Having obtained these amounts, the board should by ordinary business methods figure the percentage of profits earned in relation to its corporate assets.

Tenth. The cost of running the corporation bureau should be met in two ways:

(*a*) By the incorporation tax.

(*b*) By charging the various corporations examined an amount sufficient to pay the salaries and the expenses of the corporate examiners. The amount charged would only be about ten dollars a day for the time spent by the examiner in investigating the affairs of a corporation.

If the bureau was conducted on economical lines, a surplus ought to be obtained from the organization tax to go into the general fund; while the amount collected as a tax on profits could go to reduce the general expenses of the government.

Eleventh. Finally, the question may be asked whether the corporation bureau, or some commission or interstate court should be

given power to review and order changes in rates and to investigate and punish the giving of rebates by railroads?

The annual simultaneous inspection of railroads, and of industrial corporations proposed in the foregoing plan will discover whether railroads are giving rebates and whether they are discriminating between shippers in the matter of freight rates. The present laws on the statute books provide penalties of sufficient severity for the giving of rebates and for discriminations. Their ineffectiveness is due very largely to the inability of the government to obtain the facts upon which a judgment for conviction can be obtained. While the examination of the books of the common carriers alone might not secure the evidence required, the simultaneous examination of the affairs of transportation companies and of shipping corporations would undoubtedly bring to light all violations of the anti-rebate and discriminatory laws. No additional legislation appears to be needed if this proposed inspection is adopted.

The railroads, by governmental inspection, being freed from the pressure compelling the giving of rebates, will, for the first time, be enabled to compete with each other on equal terms. Competition will then be free and the railroad giving the best service or charging the lowest freight rates will get the business. The graded tax on profits above six per cent. will take away the desire to obtain large temporary profits at the risk of losing traffic by competing roads extending their lines to enter into direct competition.

With profits taxed so heavily and competition being on terms of absolute equality, the railroads would be compelled for their own protection to keep their rates reasonable and to give good service to the public. If this plan of inspection and taxation did not furnish the relief contemplated, the changed conditions resulting therefrom would undoubtedly suggest a remedy, possibly not so drastic as the remedies suggested to-day. Our democratic American government should not be permitted to step in and run the business of individuals by fixing the rates to be charged, whether such business be in its nature private, quasi-public or public, except as a last resort for the protection of the people when all other feasible plans have failed to provide the proper checks and needful remedies.

CONSTITUTIONAL DIFFICULTIES OF TRUST REGULATION

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The present administration at Washington, in seeking to enact laws that will curb the power of the *trusts* and prevent the abuses so common among them, has heeded the outcry raised by many intelligent people. But the popular notion seems to be that all Congress has to do is to pass laws much as Aladdin might rub his lamp, and the wished-for remedy will appear. We must not forget that Congress is limited in the scope of its action by a written Constitution, and that the acts of the legislative department must be done with a view to carrying out some power granted to Congress. If that body passes a law that is not in harmony with the Constitution, it will be pronounced void by the Supreme Court.

I.

Nowhere in the Constitution is Congress given the power to charter, regulate or control a corporation. It has long since been decided by the Supreme Court, however, that Congress has not only the specific powers mentioned in the Constitution, but also the implied powers which are necessary or proper to exercise in the performance of its specific duties. Thus, the authority vested in Congress "to establish post offices and post roads" is a definite grant of power which carries with it authority to legislate on subjects remotely connected with the mail service—authority, for example, to build a prison if that were necessary to punish those who rob the mails.

There is another important clause in the Constitution which must not be forgotten. Article X of the amendments reads: "The powers not delegated to the United States nor prohibited by it to the

states, are reserved to the states respectively or to the people." As the Constitution does not give to the federal government the right to charter or control corporations, that right must be reserved to the states or to the people; and since corporations are in all cases created by legislation, the right must be reserved to the states. It follows that any attempt on the part of Congress to enter this field of legislation, is an infringement on state rights, and therefore unconstitutional.

This conclusion must be absolutely true unless there is some specific duty imposed on Congress, the proper fulfillment of which demands that Congress legislate concerning corporations. It would then have implied power to do so. A very apt illustration is found in the chartering of a bank of the United States, which was upheld by the Supreme Court on the ground that it was incidental to the coinage and regulation of money—a prerogative vested in Congress. Yet this may not be so apt an illustration as the post office clause; for, with respect to the chartering of a bank of the United States, the Supreme Court said that it was an attribute of sovereignty to create a corporation, and no specific right need be vested in Congress.[1] If this be true, there is no need to seek further for constitutional justification for federal incorporation of interstate companies. The proposition is clear: let the United States charter all companies that desire to carry or sell goods among the several states.

Commissioner Garfield, in his report on corporations, finds some legal difficulties in such a measure, and indeed there are some. While it may be clear that Congress can incorporate a company doing interstate business, it is not evident that it can in this way abolish the trusts already created by state legislation. With that subject we shall deal presently. The commissioner recommends "Federal License" or "Federal Franchise."

Now, if any form of regulation or control is sought other than by direct federal incorporation, where shall we find authority? Aside from that very vague article which makes Congress the custodian of the public welfare, the only constitutional clause wherein we may hope to find authority for trust legislation, is that which says: "Congress shall have power to regulate commerce with foreign nations and among the several states." Under this clause the Sherman anti-trust law was passed in 1890, "to protect trade and

[1] McCulloch *vs.* Maryland, 4 Wheaton, 316.

commerce from unlawful restraint and monopoly." It provided that "any combination in form of trust or conspiracy in restraint of trade shall be illegal, and any participant in such combination . . . guilty of a misdemeanor." Up to the present year the Sherman act was so limited by judicial interpretation that it applied only to railroads and other common carriers. In the case of the United States against Knight Company[2] it was held that a monopoly for the manufacture of sugar did not fall within the provisions of the Sherman law because that act applied to interstate commerce only, and commerce did not commence until after the sugar had been manufactured. The court freely admitted, however, that a monopoly for the manufacture of sugar might tend to raise prices, and thus indirectly interfere with interstate commerce. The breaking up of the Northern Securities merger did not operate to extend the scope of the act, because that too dealt with common carriers. The recent "Beef Trust" decision is somewhat broader, but in that case the court found a conspiracy to exist which in their opinion was in restraint of trade. It is quite obvious that there are many abuses of the trusts which cannot be called a conspiracy in restraint of trade—abuses like the watering of stock—which tend to increase public suspicion of corporate organization, and which, as Judge Grosscup has pointed out, tend to lessen and destroy individualism by making the mass of the people withhold their capital from active business enterprise, abuses which must be checked, but which cannot be reached by the laws as they stand to-day.

Legislation must be extended so as to embrace control of corporations in all their functions. Whatever form such legislation may take, it must be enacted with a view to carrying out the power now vested in Congress to regulate commerce. To what extent would federal legislation be justifiable as a means to that end? As John Marshall said in the case of Gibbons against Ogden:[3] "The power to regulate commerce is not restricted to any one mode or any one branch. The term commerce describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing the rules for carrying on that intercourse." This language is full of meaning: the power is not restricted by any one mode *of regulation* or any one branch *of com-*

[2] Reported, 156 U. S. 1.
[3] 9 Wheaton, 1.

merce, and commerce is regulated by *prescribing the rules for carrying on that intercourse.* Under this decision it would seem that a rule requiring all corporate acts be made public, or a rule prescribing that all commerce among the states be carried on only by individuals licensed, or by corporations chartered, by the United States, would be upheld as the exercise of an implied power.

Or again, if, as the court said in the sugar case, a monopoly for the manufacture of sugar may raise prices and thus *indirectly* interfere with interstate commerce, surely it may be added that Congress is not limited in the scope of its action to preventing *direct* interference. It may regulate commerce to the last and most minute detail, just as it may regulate the mail service to the last and most minute detail; it "acknowledges no limitations other than those prescribed by law;" and it may prevent indirect as well as direct interference with the trade among the several states.

Our conclusion is that the Supreme Court would, in a test case, be justified in upholding almost any form of legislation in this field, on the ground of implied powers; for the court would consider only this question: "Was the act of Congress designed as a means to the regulation of commerce, and is it adaptable to that end?" The court does not ask whether the law is necessary or unnecessary,—it asks whether it was enacted in pursuance of the carrying out of some power vested in Congress. But the Supreme Court might not uphold such legislation; it might follow the sugar case, and say that Congress has jurisdiction only over interstate commerce as such, and that any attempt to regulate, beyond the actual transportation of goods from one state to another, would be *ultra vires.*

There is naturally considerable room for conjecture as to how far the court would go. Let us take an illustration: we read much nowadays about copper mines without copper, and stock without assets—well, suppose Congress passed a law requiring all corporations doing interstate business to publish sworn statements of their assets, liabilities, earnings and stock issued. Would not the Supreme Court be entirely justified in ruling that such enactment did not affect commerce and was therefore unconstitutional? Even if such a law were sustained, can a mining company engaged in digging ore, and an oil company engaged in boring the earth, be said to be doing interstate commerce when both perhaps sell their product to another company (though owned by the same capitalists) which

transports the goods? What can prevent a coterie of railroad magnates from organizing themselves into a terminal company, selling themselves the privilege of landing passengers and freight, and thus fleecing the small stockholder and the public in general? None of these companies is engaged in interstate commerce. Herein lies the difficulty of all legislation designed to prevent fraud: it can, under the Constitution, be directed against "*interstate*" companies only, while others continue their fraud and abuses as indicated above.

Something can, no doubt, be accomplished by federal intervention. Of the methods usually spoken of to-day, "federal incorporation" seems to the author a more logical solution than mere "federal franchise," first because it does not involve the rather absurd situation of a corporation created by a sovereign state being taxed, controlled and allowed to live by the sovereign United States; and secondly, for reasons which will appear in Part II.

II

The difficulty to be overcome in trying to solve the trust problem by means of federal incorporation does not lie in the vastness of the undertaking (that is a detail of the executive function), but rather in the conflict between state and nation—in the infringement on state rights which it seems to involve.

Several vital and intimately connected questions arise: (*a*) Was the right to create a corporation reserved to the states by reason of the fact that it was not granted to the United States? (*b*) May not both the United States and the several states enjoy the right? (*c*) Would it be possible for the United States to control or destroy the corporations created by the states or to prevent their engaging in interstate business?

(*a*) As we said in Part I, the right to create a corporation was certainly reserved to the states, unless it can be said that the United States has that function irrespective of direct grant in the Constitution. As a sovereignty, this nation can create a corporation. Nothing further appearing, it would be fair to assume that both the federal and state governments may exercise the right concurrently; the United States because of its sovereignty, and the states because the power which they had before the adoption of the Constitution was never taken from them. Or if the "commerce clause"

impliedly gave the right to the United States, at least the states may exercise the right until Congress chooses to do so.[4]

(*b*) While it is feasible to have corporations chartered by different powers operating at the same time, that situation does not help matters. Now, the doctrine is well settled that where the federal government has not acted, the states may, but when Congress legislates with respect to a subject matter within its jurisdiction, the states are thereby precluded.[5] As long ago as 1824 the State of New York was prevented from creating a steamboat trust, with the exclusive privilege of navigating the waters in and about New York. Congress having theretofore provided for the licensing of coasting vessels, had thereby withdrawn the subject-matter of navigation from state control, and the franchise granted by the New York legislature was pronounced void.[6]

If then, Congress enacted laws providing that no corporation hereafter organized shall conduct an interstate business unless the same shall have been organized under federal law, the whole subject-matter would be withdrawn from state control, and the system of incorporating in one state for the purpose of exploiting the others would be at an end. But all this is not enough: it will not suffice to create good trusts in the future—we must rid ourselves of the bad trusts of the present.

(*c*) One thing is essential if federal incorporation be the plan adopted: existing as well as future companies must be brought within the federal law. To condemn the charters under the power of eminent domain would vest proprietorship in the United States—perfect state socialism. To declare the charters void would, under the decision in the case of "Dartmouth College against Woodward,"[7] be a violation of contract and therefore unconstitutional. There remains but one way in which the nation could secure control: tax the franchise or stock of state corporations doing interstate business so heavily that they would be forced to accept federal charters.

From the days of the Boston tea party the American people have had a deadly hatred for anything resembling unjust taxation. But a prohibitive tax is not unknown in this country. Under the stress of the Civil War the United States becoming obliged to secure

[4] Thurlow *vs.* Mass., 5 How. Rep. 504.
[5] Brown *vs.* Maryland, 12 Wheaton, 419.
[6] Gibbons *vs.* Ogden, 9 Wheaton, 1.
[7] 4 Wheaton, 518.

a market for its bonds, placed a prohibitive tax of 10 per cent. on the issue of bank notes by state banks, and thereby forced the great majority of them to accept national charters and buy United States bonds.

In support of this means of securing control it may be argued that the tax would probably be upheld by the Supreme Court as incidental to the proper regulation of interstate commerce; for taxation has ever been recognized as a means of regulation. Moreover, if the United States taxed state corporations, the states could not—"for the term to regulate implies full power over the thing regulated; it excludes necessarily the action of all others who would perform the same operation on the same thing." Nor could any state tax a federal corporation.[8] There seems to be a conflict of interests in this situation. But where a conflict exists between state and nation, "that authority which is supreme must control, not yield to, that over which it is supreme."

One objection raised by Commissioner Garfield in his report was that "federal incorporation" would centralize vast power in the United States. On the contrary, this fact ought not to be considered an objection. The commissioner himself finds that the great difficulty attending regulation to-day lies in the diversity of state laws. Concentration of power would bring uniformity in the law as well as centralization of responsibility: to these we had best look for the desired reforms.

It is difficult to see how even compulsory federal incorporation could reach that class of evils mentioned at the end of Part I of this article, unless the nation arrogate the function of creating all corporations. But to take from the states by constitutional amendment, the right to create a corporation designed to operate within the state would be to spoil that nice adjustment of sovereignty between state and nation which forms so distinguishing and so highly cherished a feature of the American government. Many careful thinkers, however, recommend a constitutional amendment as the most practical solution; others, less careful, say, "between friends, what is the Constitution, anyhow?" and point to extra-constitutional acts in the past.

[8] On taxation in general, see McCulloch *vs.* Maryland, 4 Wheaton, 316; Brown *vs.* Maryland, supra; Telegraph Co. *vs.* Texas, 150 U. S. 460; and Fargo *vs.* Mich., 121 U. S. 230.

III.

It is true that many things have been done at Washington without the sanction of law; but there is a factor in the affairs of nations as well as of men, that transcends all law: economic necessity is a compelling force not to be restrained by written constitutions. When Jefferson negotiated the purchase of Louisiana he acted contrary to his own tenets and without authority. A great cry was made a year ago that President Roosevelt had overridden the Constitution in recognizing the Republic of Panama. Perhaps he did; at least it is clear to the writer's mind that the Republic would not have been recognized, had not the President foreseen the strategic and commercial necessity of building the canal. In 1803 it became essential for this nation to control forever the Mississippi and the commerce of North America; a century later it became essential for this nation to control the gateway to the Pacific, and thus assure forever dominion over the western continent and the trade of the world. These things and others have been done at the call of economic necessity, and have been ratified by Congress and approved by the people because they were necessary and not because they were within the strict letter of the law.

We must not, however, look for relief in the *trust* situation except through laws properly passed; for in the first place, *trust* legislation is far more likely to be brought before the Supreme Court for adjudication than matters of foreign policy; and in the second, the economic necessity for extra-constitutional action is not manifest when there is ample time to amend the Constitution if necessary. By an amendment, the powers of Congress might be carefully defined and the scope of its authority so extended as to give it exclusive jurisdiction to create and control all interstate companies. Some decided benefits might follow such a course. If the powers of Congress were exactly defined, the laws enacted would not run so great a risk of being pronounced unconstitutional. Again, the United States Senators might be more ready to act under the authority of an amendment than they showed themselves to be last year. At any rate the "common people" who are interested in railroad and *trust* matters (though not in the same way as many of the senators) would be in a position

to demand that some action be taken by the senators and representatives, or that their chairs in Congress be vacated.

Not the least objectionable feature of this plan, however, is the difficulty of the procedure. Two-thirds of both houses of Congress must agree on the amendment, which must then be ratified by three-fourths of the state legislatures.[9] If the Senate parly a whole winter over giving the Interstate Commerce Commission increased jurisdiction, we might expect them to agree on an amendment in the time of our great-grandchildren. More than that, the "State Rights" doctrine is still so strong in many states that it is very much to be doubted if three-fourths of the states could be brought to see the virtue in an amendment which would vest in the national government any increased power. Another great objection to passing an amendment is the fact that the necessity therefor is not absolutely apparent, and we ought not to tamper with our fundamental law unless the need is urgent. Until Congress has exhausted its present resources (the implied powers) there is no occasion for employing other ways and means for securing regulation of the *trusts*. Yet, as we have said, the only way to exhaust the present resources is to pass laws designed as a means to the regulation of "commerce among the several states," and then if these laws are pronounced unconstitutional, to enact new laws—surely a tedious and somewhat dangerous method involving many possible upheavals in the financial world as well as general business depression. It is not an easy thing to pass *trust* laws which will be upheld, for, as we have pointed out, the authority for such enactments can be found only by a breadth and liberality of judicial interpretation such as John Marshall was wont to give to the Constitution.

Without desiring to be pessimistic, we must say that even if appropriate laws were passed and sustained, no great good could be accomplished unless the enforcement thereof were vigorous and effective. The wiser policy will be to make haste slowly, and use the utmost care and skill in passing *trust* legislation, for the solution of the problem is as difficult and as complicated as the question itself is serious, and it demands both time, and the best work of the best brains of the land.

[9] Const. Art. 5.

THE RELATION OF AUDITING TO PUBLIC CONTROL

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The corporation is an association of persons combined for common ends. The primary principle of economic and social advantage in corporate organization is to be found in the broader co-operation made possible thereby. The corporation is the modern instrument of private and public welfare, and any consideration to be given to the subject of control by the government should proceed from the point of view of welfare to the corporation, rather than opposition to it. While practices have been permitted by officers of corporations that are deserving of the severest condemnation as opposed to public interest, the hostility that is shown (especially to those forms of corporations known as "trusts") has in large measure been born of ignorance and fostered by envy—ignorance as to the character of the institutions through which much of our national prosperity has been attained, and envy that is in a measure attributable to the greater success of those who have worked through the corporation. Out of this hostility has developed much of harm both to the corporation and to the public. The products of misguided attack have been hasty legislation and abortive attempts at public control over the corporation as a means of hampering its prosperity—attempts which, in many instances, if successful, would have thwarted national progress, violated contracts, rendered uncertain business judgment and destroyed many of our best institutions. As concrete illustration of this we have the "granger legislation" of some twenty years ago, from the evil effects of which we have not yet wholly recovered—a species of legislative action which has practically driven the larger corporations out of local jurisdictions where they should have received legal protection, causing them to find cover in states far removed from investment capital interests and from the resources to be developed.

And this hostility is growing. By the corporations removing themselves from the jurisdiction of hostile, local courts and legislatures, by seeking protection as citizens of a foreign state under the federal constitution, the demand for public control now centers in the national capitol to which are sent the political representatives of these same hostile, local constituencies. Whatever may be the mellowing effect of broader association, whatever the wider view gained by representatives in Congress, these representatives (measured by their constituency according to the hostility which they display toward corporations) are forced into an attitude which is threatening both to corporate organization and to the integrity of the government itself. By making the legislative lobby the chief instrument of corporate protection, both the government and the corporation becomes corrupted till finally popular prejudice seeking expression in law, through ignorant bias may seriously handicap material development. Such is the situation that citizen and stockholder must face in any effort directed toward a better adaptation of the law to the growing needs of the nation.

Federal legislation may be regarded as inevitable; it is sought alike both by the corporation and by the public; it is sought by the one as a means of protecting corporate interest, by the other to the end of instituting forms of inquisition that may prove discouraging to corporate activity and destructive to industrial and commercial welfare. What the next few years will develop will depend largely on the mutual consideration given by parties in interest to the merits of the question. Nothing could be more dangerous than legislation that comes in response to popular hatred; neither would it be more fortunate if the law were shaped by the usual interests of corporate officials and agents, through sharp practice and deceit. The issues must be fairly considered and fairly met by both parties without regard to the wishes or dangerous contrivances of self-interested officials or peculating corporate agents who prosper by abusing the confidence of the public as well as of shareholding proprietors.

Public Control and Public Welfare.

To be effective, public control must be such as will promote rather than impair public welfare. Accepting this as our first premise for reasoning, there are two classes of concepts that must be

understood and appreciated. These may be the more clearly brought before us by the questions: (1) What is the character and significance of the institution or co-operating group known as the private corporation, and (2) What is the significance of control.

The private corporation is a democratic institution; it is the prototype of modern democratic government; it is the creature of the state designed to promote both public and private welfare; its purpose is to secure to its stockholders and to the public the benefits of broad association and intelligent co-operation in private business without the exercise of an arbitrary will or a Cæsarian prerogative by those in official or directing position. Both creative enactment and the organic corporate structure are designed to prevent the exercise of arbitrary power by those managing community interests. Legally and organically, the corporate will is the will of the majority of the stockholding proprietors; if the acts or policy of the corporation are not in accord with public ideals and do not proceed from the expression of the will of the majority of the stockholders, if any officer or coterie of agents does exercise arbitrary power, then legally and organically the public law makers, or the stockholders, or both are at fault for permitting their servants to assume to continue to exercise this arbitrary power.

It is to the end that neither public welfare nor the private proprietary purpose may be violated that *control,* both public and private, is to be instituted. It is for the purpose of making control effective, of making the corporation as well as each agent responsive to the state as well as to the proprietary shareholding interests —that the form of corporate organization is prescribed. The primary principle of *public* control lies in the fact that a corporation must obtain a charter; as a means of protecting *public welfare* no corporation is permitted to enjoy rights or exercise powers except such as are granted to it. The principles fundamental to *private* control, or the responsibility of the corporation and its agents to shareholding proprietors, lie in the legal provisions made with respect to corporate organization.

Factors of Public Control.

Let us consider in detail the factors of control. As related to *public welfare,* the powers of control lie with the government. These

powers are legislative, executive and judicial. The powers of government are both adequate and complete. The *legislature* as the representative of public opinion, as the corporate agent of welfare, determines for what purpose and in what manner corporate powers are to be exercised; it is through laws, general or specific, by virtue of which the corporate group obtains its charter powers, that all problems concerning public policy are to be the most effectively reached. The charter or contract of incorporation determines what a corporation may do or possess. Are there questions pertaining to rights of succession, to capitalization, to property, to methods of acquisition, to eminent domain, to powers of purchase and control of the stock of other corporations? Is the public aggrieved because of franchises or public utility enjoyed, because of the domination of a corporation by a single stockholder through his power to purchase or acquire a majority control or because of the pooling of stock interests? These, and all other questions which have to do with public policy or public well-being are to be fairly considered by the law-making or charter-granting branch of the government before the corporation is organized. Is the "trust" or the "holding company" an evil? Is the purpose for which the corporation is to be organized against public policy? Then the remedy is primarily in legislation governing charter grants, and not in executive or judicial inquisition, seeking to curtail rights granted or implied.

Once a charter has been granted and accepted, or a corporation organized in accordance with the provisions of a general law, the state, by all its administrative powers, *executive* and *judicial,* is bound to enforce the contract which has been entered into between the state and the incorporators. Neither the citizen nor the government may hope effectively to reach problems pertaining to public welfare or public policy except as they themselves may control their own representatives and agents, politically appointed or selected to formulate laws defining the powers and purposes of incorporated companies. A general law of incorporation stands on the statute books as an offer to all who may wish to comply with its terms; a charter is a grant on petition. This offer when accepted by incorporators (or petition when granted) becomes a sacred compact, inviolable by executive or by court. The charter grant or acceptance, or under the general law the acceptance of legal conditions imposed

becomes the basis for investment rights which must be upheld by the government in the same manner as are other institutions of private property.

Legislative Inquiry as a Means of Public Control.

After entering into a contract with a corporation, the only question which may be raised by the government is, whether or not the terms of the contract have been complied with. To determine this fact, the government may institute any form of inquiry which it may deem most convenient or effective. The state may rely entirely on its powers of legislative inquisition, appointing commissions to take testimony and to inquire minutely into the good faith of the corporation and of its agents; legislative inquiry may also be made for the purpose of determining conditions to be attached to subsequent charters granted, investigation being directed toward the problem of control of corporations to be organized rather than toward control over those existing under present laws.

Executive Inspection and Examination of Corporate Records.

Again, the state may constitute a regular department or corps of inspectors under the control of the executive. For example: banks are incorporated under the laws of the state. The public purpose of such an incorporated society is to have a responsible agent which will furnish to the community demand credits (so-called deposits) for use in business as current funds. The social advantage is to have provided a form of cash more convenient in use and less expensive than money. The bank offers to sell to its customer an account against which he may draw, thus saving him the expense and the risk of carrying a money stock large enough to answer the needs of his business. In passing laws for the incorporation of banks the government, as the agent of the public, is interested in knowing that the credit-account offered by the bank to its constituency as cash is "sound," *i. e.,* that it will be paid on demand. To this end the legislature requires that those associating themselves for bank purposes shall contribute a capital sufficient to provide the corporation with an adequate money stock out of which the credit-accounts sold to the public may be currently redeemed. Public welfare demands an adequate bona fide cash capital, and that

this capital shall not be permitted to become impaired. As a means of ascertaining whether the charter provisions have been complied with, the government creates a department of banking control, the chief function of which is to inspect and to receive reports from banks. This is done that the government, through its executive branch, may have the means of currently collecting evidence of good or bad faith on the part of the corporation or its agents, and protect the public as well as the institution itself against corporate infidelity which may thwart the purposes of its creation.

In the interest of common welfare (expressed in service rendered for which investors may obtain remunerative return) a savings bank is incorporated. With this institution, the principle of welfare is one of stimulating savings by providing an institution through which the small individual surpluses acquired through popular thrift and economy may be gathered into large corporate funds —funds large enough to maintain a staff of trained agents for the protection of the savings accounts, and for the proper direction of capital into remunerative investment. Safety of investment, the best rate of return compatible with safety, and prompt payment of savings accounts are the criteria held before the legislature in the offer made to prospective incorporators; this is the public interest which the government has in control over incorporated savings societies.

The trust company is another form of corporate organization for public service. In our modern, complex community, under conditions of constantly widening corporate organizations, many forms of trusts have grown up on the execution of which depends the safe conduct of business, and the protection of individuals and members who may be interested in institutional results. In this, the measure of control is fidelity, conservative investment of funds and income from estates, and financial responsibility. The insurance association is organized for social protection against material want and private penury—for the protection of families out of the combined incorporated estate of the insured. In all of the investment institutions, the shareholding proprietor, if such there be, is one who has contributed a portion of capital for the protection of trust resources, and to insure the financial responsibility of the institution organized for investment service. The stockholder of such an institution, therefore, has a double duty to perform—the

one to himself, the other to the beneficiary of the corporation to which the stockholder stands in relation of proprietor. In an institution which does not have the care of trust estates or trust funds, the penalty for failure on the part of the shareholding proprietor to perform his duty is personal loss; in a trustee institution whatever may be the pecuniary loss to the shareholder, the law should compel a strict propriety control in the interest of the beneficiary. In such case not only the officer of the instituton, but the stockholder also stands in a position of trust responsibility.

The same is true of the public service corporation. If gas is to be supplied, the organic complexity of a modern municipality may require that the government exercise extreme care in the granting of charters, and that there be such inspection as to protect the public against inferiority of product. The water supply touches not alone the interest of public convenience, but also has an important bearing on public health. The transportation company is incorporated to perform a service on which depends not only commercial and industrial welfare, but quite as much conditions of health and comfort which are centered in the habitat of the individual citizen. Food, air, light, recreation and business are all closely interlaced with the affairs of the public service corporation. These are institutional facts that must be recognized and must be fairly dealt with by the corporation. On the other hand, the people must recognize the character of the corporation and must reckon with the fact that corporations are organized for public service and that any control which tends to hamper or weaken corporate activity must necessarily interfere with the usefulness of the corporation to the public itself.

With reference to all incorporated institutions the government, as the representative of social order and welfare, has an interest in knowing that corporate control is exercised over the agencies or trustees entrusted with the corporate estate—an interest in control which runs not only to the institution, as such, but also to the shareholding proprietor. This interest requires that the duties and responsibilities placed on the institution and on the shareholding proprietor shall be strictly fulfilled, but in case these corporate duties and responsibilities are met, every administrative controlling purpose shall have been complied with. As a means of knowing whether the corporation has complied with the charter contract, the govern-

ment vests its department of inspection with power to furnish to the state evidences of infidelity or non-feasance. But with this public inspection should end. The rights, powers and conditions under which the company is to operate must not be interfered with.

The Courts as Instruments of Public Control.

Evidences of non-performance or malfeasance having been detected through official inspection, or otherwise, the department of justice stands ready, by mandamus, by injunction, by quo warranto proceedings, by receivership, or by charter annulment and dissolution, or other legal or equitable processes to enforce strict compliance with the contract made by the incorporators with the state. The courts may interfere either for the protection of public welfare or as a means of protecting the corporation itself against the acts of its agents. Through the courts any and all provisions made for social or corporate protection as defined in legislation, or in legal precedents of control may be strictly enforced. But any interference on the part of the government, either through its executive or judiciary, which goes beyond this would prove destructive to private right, and impair the purposes for which the government itself has been organized.

Significance of Private or Institutional Control of Corporations.

In approaching the problem of control two further premises may be laid down as a basis for reasoning: (1) that any influence which tends to encourage the larger and more rapid development of these several institutional forms of co-operation is an influence which makes for social progress and individual welfare; and conversely, that any influence which tends to discourage the larger and more rapid development of these several forms of co-operation are influences which stand in the way of social progress and individual welfare. (2) That in institutional and social welfare must be found the largest success of the corporation itself and, therefore, that the interest of the public is the interest of the shareholding proprietors of the corporation as well as of the several corporate agents entrusted with the management of its affairs.

Proceeding from the view-point of corporate success, the question of control resolves itself into terms of corporate integrity and

efficiency of corporate management. The ideal of corporate integrity is that every officer and employee shall completely bury his own selfish purposes and devote his best thought and talent to the ends and purposes of the institution. Corporate fidelity is the essential principle of corporate success. It is to the private corporation what patriotism is to the public institution.

Any system of control which looks to the success of the corporation must have in mind fidelity of service, and this must come from within and not from without. When corporate character has been established and a disposition exists on the part of employees to devote to the institution the best thought they have to give, the question of corporate efficiency is one which depends on the exercise of discretion in the choice of agents. But the exercise of this discretion must likewise be considered in any system of effective control; this cannot be supplied by government inspection or legal inquisition. The control which makes for corporate success is the control which encourages the larger and more rapid development of the several forms of institutional co-operation through which the largest social welfare may be attained. This control must be within the corporation itself and cannot come from without.

Legal Provisions for Private Corporate Control.

Before the committee appointed by the legislature of the State of New York to investigate the management of the insurance societies of that state, one of the directors of the Equitable Life Assurance Society of the United States, and a man prominent in the affairs of many corporations, expressed the opinion that the system of directorship in the great corporations of to-day is such that a director has practically no power; that the director (representing the beneficial interests) is considered a negligible quantity by the executive officers of the society; that especially was this true when one man obtained control over the affairs of the association. Whatever may be the practice or usage in our great corporations, this statement does not accord with the spirit and intent of the law. The law contemplates a strict control over the corporation by those holding a beneficiary interest. As before suggested, the legal provisions made for private control are found in the form of organization prescribed. The legal principle of private control is one of trusteeship—a prin-

ciple most carefully and righteously guarded by the courts holding the trustee to the strictest account. The trust organization as an instrument of corporate control may be described as follows: (1) As a means of rendering possible the prevention of the exercise of arbitrary power on the part of a single stockholding proprietor, the stockholders, as such, are deprived of all rights or powers to transact any of the business of the corporation; no proprietary power or franchise of the corporation is placed in the hands of the stockholders. The corporation as an artificial person is the sole owner and entitled to the exclusive, constructive possession of all properties; it alone has the right to exercise powers and to enjoy corporate privileges. (2) A further protection to the shareholder is found in the fact that the constructively possessed artificial person (the corporation) to which has been entrusted his capital has in itself no power to act except through living, thinking, morally and legally responsible officers or agents called a board of directors; these are selected by a majority vote of the shareholding proprietors of the corporation. (3) To make corporate trusteeship the more secure, to remove still farther the possibility for the exercise of arbitrary power on the part of those in control of the corporation, the active business of the company is taken out of the board; while they are the direct representatives of proprietors and beneficiaries they are permitted to act in a representative capacity only, being in the position of intermediaries between stockholders and beneficiaries whom they represent, and the officers appointed by them to carry out the details of the business. (4) The actual possession of properties, and the current operations of the company are left to officers or agents—creatures of the board appointed by and responsible to it. This corporate form of organization is intended to give to the shareholder a double protection, and to the corporation itself a triple legal bulwark—a triple refinement in agency responsibility. On the first group, the shareholder, rests the responsibility for expressing the corporate will by a majority vote, and for the selection of a representative board. The second group, the board or trustees selected by the shareholders, is responsible for the general direction to be given and for the selection of the active agents and employees of the company. The third group is responsible to the company through the board; while legally under the control of the directorate, the officers' ultimate responsibility is to the stockholders—the proprietors not of

the funds and properties, but of the corporation which owns the funds and properties.

With this form of organization it is possible to institute a system of corporate administration which will not only locate personal responsibility for every act of the company, but will also accurately determine the fidelity and ability of each agent. The problem of corporate administration is (1) to associate together a group of corporate servants, or agents, acting under a legally devised system of trusteeship which will effectively co-operate to carry out the purposes of the organization, and (2) to direct this co-operating or serving group with the highest intelligence and efficiency. *Private, corporate control goes to the second administrative problem above suggested, viz.: that of fidelity (public or private) to the purpose of the organization and to the intelligence and the efficiency with which each corporate agent or employee conducts himself.* The problem of corporate control, therefore, must be considered as having two significant bearings: (1) being a creature of the state, created in the interest of public welfare, public control may be exercised to the end that public interests may not be violated; (2) since the state has permitted it, as an institution, to receive contributions of capital as a means of accomplishing the common proprietary purpose, provision is made for the exercise of proprietary control over that institution and its agents as a protection to those having vested rights.

Factors in Effective Private Control.

With broader co-operation and consolidation, and with the increased complexity of organization, the problem of private corporate administration becomes an increasingly difficult one. Official and proprietary discretion must rest on intelligence. Adequate intelligence may come only through the operation of a thorough system of institutional record, inspection and account such as will give to those in positions of control an accurate knowledge of the details and results of business—a system of control which will give to each subordinate full credit for fidelity and ability, as well as mark the infidel and the incompetent for discipline or removal.

To be effective, a system of private or institutional control must also have regard to the several classes of proprietary and trust

responsibility provided for in the legal form of organization. Responsibility for administration is of four kinds: (1) The proprietary responsibility of stockholders; (2) the representative responsibility of a board; (3) the operative responsibility of the officer and of his subordinates, and (4) the employees' responsibility to those in directing position for intelligent and faithful service. Intelligent and effective corporate or private control, and the protection of those interests and purposes for which the corporation was created and capitalized, demands that the employee shall report to the officer, that the officer shall report to the board, that the board shall report to the share-proprietor, and that the share-proprietors shall with integrity perform their duties toward each other, toward creditors and the public in the exercise of proprietary discretion. To the end of obtaining accurate, well-classified, and well-digested information, answering to these several classes of responsiblities a system of subsidiary and controlling accounts is devised and installed by which those in operative and directive trust relations may keep an accurate record of the doings.

The Relation of an Audit to Corporate Control.

An audit pertains not to *public* control but to a system of *private or institutional* control; it has to do with adminstrative methods with operative results obtained by the corporation as a working group, and not with questions of public policy or public welfare. The audit is a method by which an accountant inspects the system of *private* administration for the purpose of determining whether this gives to the corporation itself and to the corporate proprietors the control which is intended by public laws of trusteeship—to determine where this control is weak or wanting, and where, on account of administrative weakness or lack of control, there has been infidelity or inefficiency in the service. Looking at the question of control from the view-point of corporate success, auditing is a primary essential without which neither the share-proprietor, the board, nor the officer himself may know whether the agent or subordinate has been faithful or, for that matter, the institution itself has fulfilled the purpose of its being. The audit has no direct relation or bearing to any method or system of public control as exercised under democratic, as distinguished from bureaucratic, government.

The Relation of an Audit to Public Welfare.

There are two general aspects of public interest in corporations, viz.: that which looks to the enforcement of charter contracts representing ideals of public policy and welfare, and that which would enforce social order as expressed in rules of business integrity, in performance of private legal obligations, in the execution of private trusts, etc. Proceeding from the assumption that the government should by proper legislation provide for the orderly conduct of a business, and for enforcing the performance of private duty, it may be held that in addition to the powers of inspection by the government as a means of determining whether charter provisions have been complied with, there should be a bureau of corporation audits which should inquire into the question of the working relations of the corporation. This argument, however, would seem to be vicious for two reasons: *First,* because there is no greater or stronger reason for the government inquiring into the private relations of corporations as a means of protecting parties interested against the infidelity of others, than there is for the government questioning the private relations of partners; in fact, under the legal form of organization, a corporation which has installed a proper system of private control would have less reason for the government inquiring into its working relations since there is every legal method provided for holding officers, agents and employees to the strictest account; there is no part of our law which is so jealously guarded and enforced, as is that which pertains to trustees—any infraction coming to the attention of a court finds remedy in civil damages and exemplary punishment under the criminal code. *Second,* for the reason that the corporation and those interested in the corporation are in a much better position administratively to protect themselves through a system of current account and regular audit than could possibly be done by a bureau or branch of the government.

As a means of providing for the orderly conduct of the business of its corporate creature, the only question that the government is interested in is to know whether or not the corporation has installed a method of record, inspection and account which will hold its officers and agents to a strict account, as contemplated in the form of corporate organization prescribed, and whether or not an independent or disinterested audit has been provided as a means of giving assurance

as to the correctness of financial or operative statements made. Such is the English law pertaining to corporations. The argument in support of this is that the corporation, being dependent on its agents for the exercise of its powers and for the use of its properties (its funds and other resources being entrusted to them), these same agents by reason of their position having in their hands the records and accounts through which proprietary control is to be obtained, there should be an independent or disinterested auditor over the system who is not responsible to, or controlled by these corporate agents. When it is reflected that the welfare of the nation is so largely involved in the integrity of corporate agents, much force is given to the argument.

Independent Audit of Corporations as a Means of Control.

Proceeding from the assumption that the government should provide for the means whereby corporate integrity may be established, two systems of independent audit have been evolved: (1) what may be styled the Continental system, and (2) the English system. These two systems have grown out of two distinct forms of political organization—the one arbitrary and bureaucratic, the other representative and democratic. Under the German, French or Russian system the government exercises a rigid inspection, and conducts the audit of corporations through which the public looks for protection. The success of such a method depends for its honesty and efficiency, in the first place, on the government itself being free from political or private influence, and, in the second place, on having within it the highest and best of professional intelligence. Thus, in Germany, for example, it is in the service of the government that are found the best engineers, the best financiers, the best lawyers, the best accountants. Again in Russia, the government being highly bureaucratic undertakes the paternalistic responsibility for the protection of private interests represented in the corporation; it does this through inspection and audit as a means of determining whether or not the officers and agents of the corporation have performed their responsibilities with fidelity and efficiency.

In England, the governing ideal is one of determining by public inspection and control whether or not the corporation has complied with the charter provisions, making it a condition precedent that the

corporation shall provide for itself an independent auditor, holding him (as the appointee of the stockholders or, in default of election at a regular meeting, as the appointee of the government for the stockholders) responsible for the accuracy of statements made which would reflect the fidelity or efficiency of corporate agents. To quote from "The Companies Act":

"Every company shall, at each annual meeting, appoint an auditor or auditors to hold office until the next annual general meeting.

"If an appointment of auditors is not made at an annual general meeting, the Board of Trade may, on the application of any member of the company, appoint an auditor of the company for the current year, fix the remuneration to be paid to him by the company for his service.

"A director or officer of the company shall not be capable of being appointed auditor of the company. . . .

"Every auditor of the company shall have a right of access, at all times, to the books, accounts and vouchers of the company, and shall be entitled to require from directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors, and the auditors shall sign a certificate at the foot of the balance sheet, stating whether or not all of their requirements as auditors have been complied with, and shall make a report to the stockholders on the accounts examined by them, and on every balance sheet laid before the company in general meeting their tenure of office; and in every such report shall state whether or not, in their opinion, the balance sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, as shown by the books of the company; and such report shall be read before the company in general meeting.

"If any person, in any return, report certificate, balance sheet, or other document required by or for the purpose of this act, wilfully makes a statement false in any material particular, knowing it to be false, he shall be guilty of a misdemeanor, and shall be liable, on conviction, and on indictment, to imprisonment for a term not exceeding two years, with or without hard labor, and on summary conviction to imprisonment for a term not exceeding four months, with or without hard labor; and in either case to a fine in lieu of, or in addition to such imprisonment aforesaid."

When we reflect on the efforts at corporate regulation through public examination and on the failure of attempts made in this country to regulate the affairs of corporations through public examination, we may well question the propriety, as has England, of relying on bureaucratic methods for the protection of private interests, especially when these private interests are in a much stronger position to bring evidences of irregularity before the courts and enforce their

rights. The English system is one which places on the stockholders themselves (the proprietors of the corporation) the duty of providing the means of effective control—one which places on the joint proprietors of the corporation (the stockholders) the duty of appointing an independent auditor for the critical inspection or examination of the system installed and operated by the officers of the company. It is as necessary as is the appointment of any other officer in default of which a department of the government may assign an independent auditor to duty. That the officer may know whether the report of the employee is to be relied on, that the director may have a true record of results from the officer in charge, and that the stockholder may have before him a proper basis for estimate of integrity and ability of the several forms of corporate trustees and agents, the law requires that a corporation before it shall begin business shall choose, among other officers, an independent auditor who shall be in no way interested in the business, who shall certify to the correctness of reports, and who shall become responsible, both civilly and criminally, for the truth of the statements made over his certificate. This is not only a legal recognition of the importance of the audit to effective administrative control, but it is also a recognition of the duty of government to provide the conditions most favorable to success in the administration of an institution created in the interest of public welfare and dependent on trustees for its operation. It is a provision which requires the establishment of conditions necessary to an intelligent knowledge of affairs. It protects the corporation by permitting it to choose its own auditor. It protects the public and insures to it the highest social return by putting into the hands of the corporate authorities the means whereby the institution may attain the best corporate result. In the English system is found the best method for the administrative control of corporations that has been devised. True to the purposes of its enactment "The Companies Act" of England has most effectively regulated the corporations coming under its jurisdiction without submitting the companies themselves to prying inquisition and to the blackmailing possibilities of corrupt and inefficient officials.

FEDERAL SUPERVISION AND REGULATION OF INSURANCE

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The agitation for the federal supervision and regulation of the insurance business must be viewed as marking a step in that gradual extension of federal control over industry and commerce which is asserting itself more and more with the increasing intimacy of commercial relations irrespective of state lines, and which is bound to continue until ultimately every important commercial interest whose practice is national in scope shall have been brought within the reach of federal law. Beginning as a local business, insurance has developed into a colossal institution, national and international in scope, and involving, as the President stated in his annual message to Congress, "a multitude of transactions among the people of the different states and between American companies and foreign governments." Into this important field of business, always regarded heretofore as within the control of the several states alone, it is now proposed to extend the power of the national government, and to such an extent that the authority of the states, although not completely eliminated, will become merely incidental.

Certainly this is a most radical change in view of the vastness of the interests involved. According to recent estimates,[1] it appears that, even excluding the business of the large number of fraternal beneficiary associations and local mutual fire companies, the amount of insurance in force in the United States aggregates $50,000,000,000, while the assets of the companies have accumulated to the gigantic sum of $3,000,000,000. Each year, it is estimated, that the people of the United States, approximately 20,000,000 of whom are directly interested in insurance as policyholders, pay $1,000,000,000 in pre-

[1] Majority Report of the Committee on Insurance Law presented at the meeting of the American Bar Association, August 24, 1905.

miums to insurance companies, and receive approximately $800,000,000 in return. The magnitude and importance of the business as indicated by these figures can scarcely be comprehended, and, being in the main a business of trust, the necessity for strict government supervision must be apparent. Indeed, the supervision of insurance by the government is to-day regarded as an absolute necessity by every authority on the subject, and is considered even more essential than in the case of banks. Insurance contracts, especially in life insurance, may run for years before maturing, the possibility always presenting itself of a company promptly paying its current claims, and yet being hopelessly insolvent as regards its future obligations. Moreover, it is practically impossible for the individual to determine for himself the financial standing of the company into whose care he has entrusted the protection of himself and family, into whose coffers he has paid his premiums for years, and upon whose ability to pay when the time comes he implicitly relies. The only way to determine the solvency of an insurance company is to calculate the present worth of its future obligations, and to compare this and the accrued liabilities with the available assets. This is a task beyond the power of individuals, many of whom have little information about insurance except the name of the company whose policy they hold. It is a task which can be adequately undertaken only by the government; but, while there is a consensus of opinion regarding the necessity of government supervision, the question as to whether the supervising authority ought to be the nation or the several states has been a disputed one for over forty years, and ,as we shall see, is still far from settlement.

Historical Review of the Subject.[2]

The question of national versus state regulation of insurance may be said to have had its origin in the passage of the National Banking Act of 1864. Although applying only to banks this act suggested the possibility of extending federal control to the insurance business. In the very next year Congress was memorialized by certain companies to free them from many of the vexatious burdens connected with state supervision. It was proposed in the

[2] For a detailed account of the history of this subject see John F. Dryden's "An Address on the Regulation of Insurance by Congress," delivered at a meeting of the Boston Life Underwriters' Association, November 22, 1904.

memorial that Congress should pass a national incorporation act which would enable insurance companies, like national banks, to become federal institutions. A bill to this effect was introduced in the Senate in 1868, but met with the fate that awaits any measure which attempts to take away the constitutional right of the several states to create corporations engaged in interstate commerce. But while this bill received little support, it is important to note that at this early date, when insurance was much more in the nature of a local institution than now, national supervision, nevertheless, claimed among its supporters some of the most influential men connected with the insurance business. Mr. Elizur Wright, for example, often called the father of state insurance supervision, upheld federal control most vigorously upon the ground that it would greatly simplify matters and be much more economical than state regulation; that it would protect the policyholders equally well, if not better; and that insurance was, by its very nature, a national interest and better adapted to federal than local control.

In the same year that the bill providing for the national incorporation of insurance companies was introduced, there occurred another event which completely changed the status of the problem of national supervision, and which has been inseparably connected with the discussion of the subject from that date to this. This new factor was the famous case of Paul *vs.* Virginia, decided by the United States Supreme Court in 1868, and confirmed in later decisions, according to which the issuance of a policy of insurance was declared not a transaction of commerce and therefore not subject to federal control. Although this case, as well as those that followed, did not bear directly on the point at issue, the opponents of national supervision have always assumed that in view of these decisions, the Supreme Court would declare unconstitutional any act seeking to deprive the states of their present right to supervise that part of the insurance business which is interstate in character.

The unfavorable decision of Paul *vs.* Virginia and the defeat of the bill of 1868 did not, however, crush the movement for federal regulation. For the next twenty-five years its advocates waged an educational campaign which resulted, at least, in the development of a most extensive literature on the subject. Finally, in 1892, things seemed ready for another attempt at congressional legislation. In that year Mr. John N. Pattison, president of the Union Central Life

Insurance Company, introduced a bill providing for a system of national regulation of insurance companies engaged in interstate business. Such companies were to report to a National Bureau of Insurance, and were thereafter to be exempt from all other requirements except those which Congress or the states from which they had secured their charters might see fit to impose. Owing, however, to its being weighted down with too many provisions of detail, the bill invoked sufficient opposition to prevent its becoming a law. In 1897 the matter once more came before Congress in the form of the "Platt Bill," modelled closely after the "Pattison Bill" of 1892, but again, owing largely to the pressure of other business connected with the Spanish-American War, the bill failed to secure favorable action.

The next important step in the movement for federal supervision was the establishment of the new Department of Commerce and Labor on February 14, 1903. This department was authorized, through the Bureau of Corporations, "to gather, compile, publish and supply useful information concerning such corporations doing business within the limits of the United States, as shall engage in interstate commerce or in commerce between the United States and any foreign country, *including corporations engaged in insurance.*" While not of far-reaching importance, this act, nevertheless, meant an advance, since it marks the first successful attempt on the part of the federal government to recognize insurance as a business which demands national and not merely local attention. Then on December 8, 1904, followed President Roosevelt's message to Congress in which he declared insurance to be a business which "vitally affects the great mass of the people of the United States and is national and not local in application," and in which he urged that "Congress carefully consider whether the power of the Bureau of Corporations cannot constitutionally be extended to cover interstate transactions in insurance." Following this expression of Executive approval came the bill of December 12, 1904, introduced in the House by Mr. Edward Morrell, but which was referred to the Committee on Interstate and Foreign Commerce. Lastly, we have the bill introduced in the Senate by Mr. John F. Dryden, president of the Prudential Insurance Company of America. This bill marks the latest attempt to secure national supervision through congressional action, and represents better than all former bills the present-day requirements of such legislation.

Briefly summarized, the bill introduced by Senator Dryden provided for an official in the Bureau of Corporations called the Superintendent of Insurance. This official was to be appointed by the President and placed in charge of a bureau called the Division of Insurance, and was to be assisted by an official known as the National Actuary. Policies of insurance were deemed by the bill to be "articles of commerce and instrumentalities thereof," and the delivery of contracts of insurance or the transmisson of premiums or other sums between the several states or between this nation and other nations were declared transactions in interstate or foreign commerce. Express provision was made, however, that "the provisions of this act shall not apply to any corporation transacting the business of insurance exclusively within one state, district or territory: and *provided further,* that this act shall have no application to any religious, charitable, benevolent or purely fraternal society or association." The superintendent of insurance was authorized to require reports in any form he might choose to prescribe from the various companies transacting an interstate or foreign insurance business, and might also examine the business of such companies whenever he saw fit. Every company was to file with the superintendent a certified copy of its charter and by-laws together with its last statement, and was also to make a deposit with the Treasurer of the United States, as a guarantee for the faithful performance of its contracts, United States bonds or other securities satisfactory to the superintendent to the amount of $100,000, unless the superintendent would accept as satisfactory a similar deposit in the state where the company had secured its charter. After all these requirements had been complied with, the superintendent was to grant a license to the company authorizing it to transact such interstate or foreign business in any or all parts of the Union. Provision was also made that if a foreign nation should refuse American companies such a license or should subject them to rules and regulations different from those applying to companies having their origin in the said foreign country, then the superintendent was to refuse such a license to the companies of that country transacting or seeking to transact business here, and was to subject them to the same rules and regulations applied by the foreign country against American companies.

Although containing many admirable provisions, the bill, as outlined, was introduced too late in the session to secure proper consid-

eration. There is every reason to believe, however, in view of the President's attitude on the question, and the increasing demand for such legislation, that the same or a similar bill will be introduced in the coming Congress. All previous attempts to secure federal control of interstate insurance, it is true, have come to naught. But at the same time it cannot be denied that public sentiment is steadily growing in favor of federal supervision. To quote the Committee on Insurance Law of the American Bar Assoociation: "No one has offered any substantial reason against federal supervision and it is advocated by the President of the United States, and many state insurance commissioners, and favored by leading insurance officials and numerous insurance journals. Besides these, the general press is in favor of any movement in the direction of greater corporate publicity, and the patrons of insurance—the people—favor federal supervision of the business as the national banks are supervised."[3]

Arguments in Favor of National Supervision.

But what are the reasons, it will be asked, which are thus moulding public sentiment in favor of national supervision? A full answer to this question is quite impossible for the present, since the arguments which have been advanced from time to time are exceedingly numerous. Briefly stated, the principal arguments are:

1. That national supervision will greatly lessen the unnecessarily large cost of supervising insurance companies by fifty-two separate state and territorial departments, and that by thus lessening the expense it will decrease the cost of insurance.

2. That it will obviate much of the burdensome and discriminatory taxation now imposed by the several states upon insurance companies of other states.

3. That it is the only means of remedying the present lack of uniformity in our state insurance laws; that it will be a step toward uniform regulation and supervision of insurance companies; and that it will afford relief from the many petty exactions imposed by the different state departments, as well as from the evils resulting from variations in the rulings of the several insurance commissioners.

4. That it will afford better protection to policyholders, and will result in the elimination of fraudulent insurance enterprises.

[3] Page 5 of the Report of the Committee on Insurance Law, presented at the meeting of the American Bar Association at Narragansett Pier, R. I., August 24, 1905.

5. That it will entitle any insurance company reporting to the national government to transact business in all parts of the Union, at the same time protecting that company against the retaliatory legislation of other states.

6. That foreign countries would regard with much more weight the certificates issued by a national department, and that the federal authorities would be in a much better position both to protect American companies transacting business abroad and to supervise the large number of foreign companies transacting business in the United States.

7. That centralized supervision by trained experts would enable the national government at small expense to provide for a much greater degree of publicity as regards this most important business than is possible at the present time. Information regarding the principles, operation and condition of the business could be disseminated throughout the country in clear and concise form as contrasted with the confusing, voluminous and often meaningless mass of statistics issued from time to time by many of the state insurance departments.

8. That insurance is both in theory and in practice a national and international business, and not a fit subject for state or local control.

Directing our attention to a more detailed examination of the above contentions, it would seem to require but little argument to show that state supervision and regulation has proved needlessly burdensome and expensive. Although an institution which does not create wealth, but merely equalizes misfortune and aims to protect the individual and the family against loss, insurance has, nevertheless, been subjected to a multitude of taxes and fees, until to-day it is estimated that the business contributes the enormous sum of between $20,000,000 and $25,000,000 annually to the treasuries of the various states. Nor does this enormous charge bear any direct relation to the service rendered by the states in the way of supervision. Instead, it appears from a recent compilation of data furnished by twenty-eight states, that, *exclusive of all taxation,* over $5,000,000 more was collected by these states than was needed to defray the cost of supervision. In England for example, efforts are made to encourage a business so essential to the family and the state and so promotive of the community's interests as insur-

ance, by exempting a portion of every income if expended for that purpose. In the United States, however, despite the fact that insurance is itself a tax which in the end must fall upon the community, and that by protecting the family, encouraging thrift and supporting industry, it relieves the state from large expenditures which would otherwise have to be incurred, the various state legislatures have nevertheless vied with one another in reaching the funds of insurance companies through taxes and fees of every sort and description. In fact, the insurance departments of many states, since they accept without question the examinations made by a few of the more important states, have become nothing more than salary-earning and tax-collecting agencies. There can be no doubt that if federal control over interstate insurance can be constitutionally established, the large and unequal tax burden upon insurance companies can be largely removed, and existing taxes properly applied. Similarly the expenses of supervising the business through fifty-two separate departments can probably, as has been estimated, be reduced to one-tenth its present amount.

But quite as flagrant as the tax abuse and the large cost of supervising the business is the absolute lack of uniformity in our state insurance laws. If a compilation of these laws were attempted a most curious spectacle would be the result. It would be found that the fifty-two states and territories are all acting along independent lines and that each, as has been correctly said, possesses "its own schedule of taxes, fees, fines, penalties, obligations and prohibitions, and a retaliatory or reciprocal provision enabling it to meet the highest charges any other state may require of companies of other states."

In the field of taxation, for example, there is neither method nor uniformity of rate. Some states will tax premiums after allowing for losses and expenditures within the state, while others will tax gross premiums without any deduction, thus presenting the interesting anomaly of companies being taxed upon their losses and expenses. Again, in addition to the usual property tax, there is the large variety of fees imposed for the right to enter a state to transact business, for municipal licenses, for filing documents, or for licensing agents. Nothing perhaps more forcibly illustrates the unequal and unscientific character of state taxation with reference to the insurance business than the experience of the New York Life

Insurance Company some years ago. As regards twenty-five states where the insurance in force aggregated $317,000,000 the taxes amounted to only $23,000, while in the twenty-four other states and territories representing $313,000,000 of insurance the company paid $207,000 in taxes.[4]

In addition to the evils of unscientific and unequal taxation of insurance companies it is also important to remember that the state legislatures at each session enact a multitude of new laws, many of them detrimental to the interests of the public, certainly annoying to the companies, and frequently in direct conflict with the laws of other states. Especially in fire insurance have the evils of state legislation become clearly apparent. Despite the general introduction of a uniform fire policy in the United States, its provisions have given rise to a great diversity of judicial opinion in the several states, so that its provisions mean one thing in one state, another thing in a second state, and are prohibited in a third. At present nearly one-third of the states have anti-compact laws, nearly one-fourth prohibit the use of the co-insurance clause, nearly one-half have enacted valued policy laws, while nearly three-fourths possess retaliatory enactments—all of which legislation can only be characterized as opposed to the underlying principles of insurance, and detrimental to the best interests of the public. Other states, again, seek to prohibit the company from applying for the removal of an action from a state to a federal court on pain of having its license revoked. Then there are the evils resulting from the different rulings and demands of the insurance commissioners of the same state and of the various states. Finally, there is the right, frequently exercised and leading to duplicate and uncalled for examinations, of the various insurance commissioners to examine all companies transacting business in their state whenever they see fit and at the company's expense.

Examples like these might be greatly multiplied, if space permitted, to show the evils of the present system. Suffice it to say that many insurance commissioners are fully aware of these evils, and have not hesitated to declare their views in favor of a change. Even a supporter of state supervision like Mr. S. H. Wolfe, recently expressed his dissatisfaction with the existing system of insurance laws in the following words: "Each state has an insur-

[4] Fricke's text book on Insurance, page 14.

ance code of its own, and the difficulties and annoyances which insurance companies experience in trying to comply with fifty different sets of laws may well be imagined. There is a crying need for uniformity in this matter, and for a radical change in the laws of all the states. I know of no one state which possesses a code of insurance laws which may even be termed reasonably satisfactory. The insurance business has attained such proportions, and contributes so liberally through taxation to the income of the state, that it is entitled to more equitable and reasonable treatment than it is receiving at present."[5]

Whether this state of affairs can be changed under the present system may well be doubted. Certainly the difficulties of unifying and controlling the action of fifty or more legislatures and the same number of insurance departments with reference to the much misunderstood subject of insurance, may well be questioned in view of our past and present experience. It seems to be beyond reasonable doubt that if Congress could constitutionally create a national insurance department, possessed of the same powers now exercised by the fifty-two state and territorial departments, and place it in charge of competent men holding their positions by reason of special fitness rather than political affiliations, much of the heavy and discriminatory taxation, unnecessary expense, and lack of uniformity in legislation and supervision could be eliminated. There can be little doubt also that centralized supervision could be made much more effective than state supervision in extending publicity; in protecting American companies abroad, and supervising foreign companies transacting business in this country; in granting protection to the insurance companies of one state against the retaliatory acts of other states; and in affording additional protection to policyholders by using the strong arm of the federal government in stamping out fraudulent enterprises.

Insurance in Theory and in Practice is an Interstate Business.

Aside from the arguments just advanced in favor of national regulation, it is important to note that insurance is both in theory and in practice an interstate business. To derive the benefit of the

[5] See S. H. Wolfe's lecture on State Supervision of Insurance Companies in THE ANNALS of the American Academy of Political and Social Science, September, 1905, page 141.

law of average which fundamentally underlies the successful operation of all forms of insurance, it is essential that the business should be spread over as wide a field as possible. Hence it is that the development of the business has naturally and necessarily been national and international rather than local. In fact, the proportion of insurance written by American companies in the states where they were organized is exceedingly small, while the interstate business and the business transacted by American companies abroad and by foreign companies on American soil is suprisingly large. In life insurance, for example, it appears that in the case of twenty leading companies, transacting nearly nine-tenths of the total ordinary life insurance of the country, only 15.5 per cent. of the total amount of their outstanding policies is held in the home state, only 14.5 per cent. of the new policies are issued in the home state, and only 12.6 per cent. of the total premium income is collected there. Even in the case of the four largest companies in America, domiciled in the wealthy and thickly populated State of New York, considerably less than one-fifth of the total business is intrastate, while over four-fifths is interstate and international.

In the case of fire and marine insurance the situation is equally striking. The seventeen largest fire insurance companies of New York, with risks exceeding $50,000,000 each and with a combined total of risks aggregating $5,740,000,000, wrote only 25 per cent. of their business during 1903 in the home state, and received only 16.7 per cent. of their premium income from the intrastate business. In Pennsylvania the respective percentages for the same class of companies (with risks of $1,636,000,000) were only 10.5 per cent. and 10 per cent.; while in the case of eighteen American companies belonging to the same class, but domiciled outside of New York and Pennsylvania, and carrying risks of $5,520,000,000, the proportion of the new business written and the premiums received in the home state amounted to only 5.3 per cent. and 4.9 per cent. of the total. Likewise in the list of marine, casualty, surety and other forms of insurance, similar ratios will be found as regards the intrastate and interstate business. To this may be added the important fact that the large American life insurance companies transact a considerable portion of their business abroad, and that, on the other hand, a very large proportion of the fire and marine insurance of the country is

written by foreign companies. At the close of 1903 two companies alone (the Equitable and Mutual Life of New York) held 366,725 policies abroad, aggregating $980,055,792 of insurance and representing for that year a premium income of $42,027,980.[6] During the same year foreign fire insurance companies reporting to the State of New York received $55,935,772 in premiums from their American business, or about 28 per cent. of the total premiums collected by all stock companies in the United States, and carried $7,306,000,000 of risks, or 27 per cent. of the total. Likewise in marine insurance the American branches of the twenty leading foreign companies wrote $3,723,000,000 of risks in 1903, or 54 per cent. of the total, and received nearly one-half of the total premiums collected. Indeed, in some sections like the Gulf States and the Pacific coast, approximately four-fifths of the total marine insurance written is controlled by foreign capital.

The following tables will show in greater detail the interstate and international character of the insurance business.

Arguments Advanced Against National Supervision.

Without attempting to disprove, but generally admitting the criticisms directed against the present system of state supervision, the opponents of federal control question the wisdom of enacting legislation to this effect, on one or more of the following grounds:

1. That national supervision would be an undue infringement upon state rights.

2. That the National Convention of Insurance Commissioners is composed of members who are educated to the work, and that it would be better policy to let these commissioners in general assembly continue to provide rules for the regulation and supervision of insurance, as they have been doing for over a quarter of a century.

3. That national supervision will increase the chances for fraud by placing too much power in the hands of a few individuals. The constantly changing character of the heads of the many state insurance departments is one of the most desirable features of the present system, since it renders collusion easy of detection.

4. That the supervision of all insurance companies in the United States, involving such enormous financial interests and embracing

[6] James M. Beck, North American Review, August, 1905, page 194.

TABLES SHOWING THE INTERSTATE CHARACTER OF INSURANCE.

(For the year 1903.)

TABLE I.—ORDINARY LIFE INSURANCE.*

NAME OF COMPANY.	Total amount of Policies (Designated in millions).	Percentage of Policies written in Home State.	Total amount of new Policies issued in 1903 (Designated in millions).	Percentage of New Policies written in Home State.	Total Premiums Received in 1903 (Designated in millions).	Percentage of Premiums Received in Home State.
Equitable Life Assurance Society, New York	$1,409	.208	332	.216	58	.193
†Metropolitan Life Insurance Co., New York	282	.210	101	.189	46	.054
Mutual Life Insurance Co., New York	1,445	.148	215	.123	60	.133
New York Life Insurance Co., New York	1,745	.148	330	.124	73	.151
Provident Savings Life Insurance Co., N. Y.	105	.090	34	.069	3	.111
Ætna Life Insurance Co., Connecticut	233	.040	26	.035	9	.042
Connecticut Mutual Life Insurance Co., Conn.	166	.038	10	.040	5	.061
Mutual Benefit Life Insurance Co. of N. J.	359‡	.058	47	.056	12	.059
†Prudential Insurance Co. of America	388‡	.12	102	.119	36	.038
Traveler's Life Insurance Co., Connecticut	133	.026	17	.023	4	.044
Union Central Life Insurance Co. of Ohio	197	.190	36	.132	7‡	.229
†John Hancock Mutual Life Insur. Co., Mass.	103	.135	26	.132	12	.050
Massachusetts Mutual Life Insurance Co.	169	.107	24	.070	6	.123
Fidelity Mutual Life Ins. Co., of Philadelphia	100	.215	22	.241	3	.224
Penn Mutual Life Ins. Co., of Philadelphia	308	.262	70	.206	11	.242
Provident Life and Trust Co., of Philadelphia	159	.419	18	.341	6	.402
National Life Insurance Co., of Vermont	126	.053	21	.035	5	.055
New England Mutual , Mass.	145	.195	22	.156	5	.205
State Mutual, Mass.	101	.289	14	.188	3	.294
Northwestern Mutual of Wisconsin	662	.089	80	.063	26	.080
Totals	$8.342	.154	1,552	.145	395	.126

* To economize space, the figures beyond millions are omitted in the columns. They have, however, been included in the "totals."

† 1904 statistics. ‡ Industrial insurance not included.

TABLE II.—FIRE INSURANCE.*

	Total Risks written or renewed in 1903 (Designated in millions).	Percentage of Total Risks written in Home State.	Premiums on Total Business written or renewed in 1903 (Designated in thousands).	Percentage of Total Premiums received in Home State.
New York Joint Stock Companies.				
Agricultural Insurance Co.	162	.246	1,788	.197
Continental Insurance Co.	661	.229	6,818	.158
Dutchess Insurance Co.	53	.362	694	.302
German Alliance Insurance Co.	50	.334	541	.252
German-American Insurance Co.	757	.240	7,649	.15
Germania Fire Insurance Co.	280	.251	2,717	.165
Glens Falls Fire Insurance Co.	135	.214	1,679	.140
Globe and Rutgers Fire Insurance Co.	131	.179	2,015	.164
Greenwich Fire Insurance Co.	269	.44	2,457	.227
Hanover Fire Insurance Co.	435	.331	4,253	.331
Home Insurance Co.	1,169	.266	11,911	.167
Niagara Fire Insurance Co.	277	.223	3,353	.161
Phoenix Insurance Co.	571	.203	6,440	.108
Queen Insurance Co. of America	308	.139	3,983	.075
Rochester-German Insurance Co.	110	.103	1,477	.070
Westchester Fire Insurance Co.	241	.278	2,667	.192
Williamsburg City Fire Insurance Co.	126	.377	1,351	234
Totals	5,740	.252	61,803	.167
Pennsylvania Joint Stock Companies.				
American Fire Insurance Co.	161	.151	2	.135
Fire Association of Philadelphia	403	.094	5	.085
Insurance Co. of North America	550	.096	6	.010
National Union Fire Insurance Co.	105	.132	1	.128
Penn Fire Insurance Co.	301	.108	3	.096
Spring Garden Insurance Co.	114	.086	1	.087
Totals	1,636	.105	20	.10
Stock Companies of Other States.				
Ætna-Hartford, Conn.	521	.030	7	.021
American Central Ins. Co. (Mo.)	200	.076	2	.084
American Insurance Co. (N. J.)	207	.093	2	.055
Citizens' Insurance Co. of Missouri	143	.055	2	.049
Connecticut Fire Insurance Co.	261	.020	3	.016
Firemen's Fund (California)	304	.088	4	.119
German Insurance Co. (Ill.)	261	.159	3	.143
Hartford Fire Insurance Co. (Conn.)	907	.012	12	.010
Milwaukee Mechanics Insurance Co.	137	.095	1	.092
National Fire Ins. Co. of Hartford	486	.020	5	.015
New Hampshire Fire Insurance Co.	155	.104	1	.011
Northwestern Nat'l Insurance Co. of Milwaukee	155	.089	1	.088
Orient Insurance Co. (Conn.)	117	.042	1	.024
Phoenix Insurance Co. (Conn.)	484	.020	4	.020
Providence-Washington Ins. Co.	202	.033	2	.028
St. Paul Fire and Marine	163	.123	2	.097
Springfield Fire and Marine Ins. Co. (Mass.)	361	.052	4	.044
Traders' Insurance Co. (Ill.)	151	.133	2	.130
Totals	5,220	.053	65	.049

* To economize space, the figures beyond millions are omitted in the columns. They have, however been included in the "totals."

over a dozen kinds of insurance differing radically from one another in many respects, is well-nigh beyond the power of a single department.

5. That Congress is without constitutional power to establish a system of federal control.

To understand the real force of these contentions a few words of explanation are necessary. In the first place federal supervision does not contemplate the elimination of state supervision. It seeks only to regulate insurance transactions between the states, and proposes not to interfere with a state's constitutional right to supervise its own home companies. In other words, there is to be federal control over interstate insurance supplemented by state control over domestic companies. Secondly, it should be noted that the National Convention of Insurance Commissioners is only a voluntary body without legal existence. Despite its long career and the great amount of good which it has accomplished, the evils of state supervision are still so numerous and apparent as to preclude any hope for permanent and far-reaching reform so long as this reform must emanate from half a hundred independent sovereignties.

The next two objections to national supervision, namely, the increased opportunity for fraud and the difficulty of supervising such vast interests through a single department—if valid at all—should only serve to caution Congress to exercise the greatest care in providing for the proper organization and administration of a national system. Probably no factor is more largely responsible for present evils than the political character of the state insurance departments. In nearly every state of the Union this department, which above all others, owing to the character of the institution which it represents, should be kept out of politics, is regarded as a part of the state's political machinery to be filled every few years by men who have rendered political services, irrespective of what their qualifications for the office may be. If federal supervision is constitutionally possible, a splendid opportunity presents itself to lift this most beneficient of institutions out of the realm of politics and bring it under the salutary influence of trained officials who might continue to serve through administration after administration.

The last objection is by far the most important, and for years has proved the stumbling block in the way of federal regulation. To bring insurance within the reach of the federal government,

like the railway industry, it is necessary to show that insurance companies, like railroad companies, are transacting an interstate commerce business. And here we are told that the United States Supreme Court has repeatedly declared insurance not to be commerce. In fact, this objection was the only one offered against national supervision in the minority report submitted by Mr. W. R. Vance to the Committee on Insurance Law before the American Bar Association.[7] This minority report presents the whole contention in a nut-shell. "I feel myself compelled," writes Mr. Vance in this report, "to dissent from the conclusions reached by my associates of the committee on the single proposition that 'there is no constitutional obstacle in the way of federal regulation' of the business of insurance. If insurance is not interstate commerce, it is clear that the regulation and control of the business is beyond the power of the federal government. I am of opinion that the existing methods of regulating insurance business by the several states is most defective, since it is both inefficient in preventing wild-cat companies from engaging in the business and also nedlessly expensive to those who in the last analysis bear the expenses incident to the business,—the policy-holders. I am also of opinion that federal supervision, if it were possible under our constitution, would probably remedy many of the evils existing under the present system of regulation, but I do not see that such supervision by the federal government is possible without a constitutional amendment expressly giving it the required power. . . . The proper conclusion seems to be that, however much we may desire to believe that insurance is interstate commerce and therefore susceptible of federal supervision, the matter is concluded by the carefully considered judgment of the Supreme Court of the United States against which, despite frequent assaults by its ablest opponents during a period of nearly forty years, not a single dissenting voice has been raised from the bench. Any act of Congress, with a view to such supervision, would necessarily be unconstitutional and void, and the time and money that would be required to secure its passage could much more profitably be expended in endeavoring to secure some uniform action on the part of the states based upon a more intelligent understanding of the business and of the real interests of the insuring public."

[7] Meeting at Narragansett Pier, R. I., August 24, 1905.

The Constitutionality of National Supervision.

The constitutional objection in the way of federal regulation consists of the right of the several states to exercise all those supervisory powers not delegated to the United States by the Federal Constitution. Under the Ninth and Tenth amendments, it is provided respectively that: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"; and "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." In view of these reservations, federal supervision of insurance is clearly impossible unless it is one of the powers delegated to the United States by the Constitution, and the clause which has been generally agreed upon as delegating such power—if it is delegated at all by the Constitution—is Section 8 of Article I, namely: "The Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." To utilize this "commerce clause" for the desired purpose, it is necessary to show that insurance is interstate commerce. Unfortunately, however, for the advocates of national supervision the United States Supreme Court has handed down a long series of decisions denying that insurance is commerce.[8] In the famous case of Paul *vs.* Virginia, decided in 1868, the court held that fire insurance was not commerce; then in the case of Hooper *vs.* California, decided in 1894, marine insurance was declared not to be commerce; finally in the case of the New York Life Insurance Company *vs.* Cravens, decided in 1899, life insurance was also held not to be commerce.

In the case of Paul *vs.* Virginia, where fire insurance was the subject involved, Justice Field delivered the opinion to the effect that, "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the insured, for a consideration, paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having

[8] Among the principal cases are Paul *vs.* Virginia, 8 Wall. 168 (1868); Liverpool Insurance Co. *vs.* Mass., 10 Wall. 566 (1870); Hooper *vs.* California, 155 U. S. 648 (1894); New York Life Insurance Co. *vs.* Cravens, 178 U. S. 389 (1899); Nutting *vs.* Mass. 183 U. S. 553 (1901).

an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York, whilst in Virginia would constitute a portion of such commerce." In the case of Hooper *vs.* California, in 1894, the court reiterated its opinion in the following words: "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the perils of the sea." Even as late as 1901, in the case of Nutting *vs.* Massachusetts, the Supreme Court again confirmed its former decisions, with the words: "A state has the undoubted power to prohibit foreign insurance companies from making contracts of insurance, marine or other, within its limits, except upon such conditions as the state may prescribe, not interfering with interstate commerce. A contract of marine insurance is not an instrumentality of commerce, but a mere incident of commercial intercourse."

Contending Views as to the Applicability of the "Insurance Cases" to the Question at Issue.

Notwithstanding the numerous decisions in which the Supreme Court has denied to insurance the character of commerce, and which many regard as a final expression of the Court's opinion, there are those who maintain that these cases must not be considered as conclusive against national supervision. In the first place, they contend that none of the insurance cases involved the constitutionality of a federal law. In nearly all the cases the principal question at issue was the validity of state statutes prescribing certain terms, compli-

ance with which was necessary on the part of foreign corporations before being permitted to transact business in those states; and the statutes were upheld as a legitimate exercise of the police powers. The decision in Paul *vs.* Virginia that insurance is not commerce, they regard as mere dictum and as not having been essential for the judgment rendered in that case. At the time the accepted doctrine was that the states, in the absence of congressional legislation, had the power to regulate the business of foreign corporations within their borders. Since Congress had not acted, the states were entitled to do so, and even if the court had declared insurance to be commerce, the judgment in Paul *vs.* Virginia must have been the same. In other words, this case, and those which followed, were based upon state and not federal statutes. Until Congress enacts a law providing for the regulation of insurance companies, the constitutionality of federal supervision must necessarily be viewed as an unsettled question, and no more weight can be given to the opinions expressed in the insurance cases on the nature of the insurance business than is usually attached to judicial opinions on matters that do not necessarily enter into the case under consideration.

Furthermore, the advocates of national supervision point out that the Constitution must be regarded as a growth, and as having undergone a constant evolution. Of no clause in the Constitution is this so true as the so-called commerce clause. From time to time the powers delegated to the federal government under this clause have been expanded so as to meet the new requirements of industrial and commercial progress. While the wording of the clause has not been changed, its operation has been extended to a vastly larger field than formerly, until to-day national control over interstate commerce means an entirely different thing than it meant to our forefathers, and, in view of its gradual extension to new modes of commerce, will mean something entirely different in the future than it does to-day.

There are reasons, the advocates of national supervision assert, which may lead us to believe that the Supreme Court has already in large measure retracted from the position taken in the case of Paul *vs.* Virginia. It is pointed out[9] that as early as 1877, in the case

[9] Report of the Committee on Insurance Law before the American Bar Association August 24, 1905. Page 8.

of the Pensacola Telegraph Company *vs.* Western Union Telegraph Company (96 U. S. 1), the Supreme Court decided that a New York corporation had the right to construct and operate a line in certain parts of Florida, despite the fact that the Pensacola Telegraph Company had received from the legislature of Florida the sole right to erect and operate a line within said parts of Florida's territory. The court said: "We are aware that in Paul *vs.* Virginia this court decided that a state might exclude a corporation of another state from its jurisdiction, and that corporations are not within the clause of the Constitution which declares that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.' . . . Upon principles of comity, corporations of one state are permitted to do business in another unless it conflicts with the law or unjustly interferes with the rights of the citizens of the state into which they come. Under such circumstances, no citizen of a state can enjoin a foreign corporation from pursuing its business."[10]

More recently we have the decision, in February, 1903, in the so-called "lottery cases," which involved the constitutionality of a federal statute forbidding interstate carriers to transfer lottery tickets between states. It was argued that since an insurance policy had been declared not an article of commerce, a lottery ticket would likewise not come within this category. The Supreme Court, however, by a vote of five to four, upheld the statute and declared a lottery ticket to be an article of commerce. The force of this decision as weakening the authority of Paul *vs.* Virginia has been clearly expressed by Mr. James M. Beck in the following statement: "Apparently, there was no logical distinction between the two; for, if the lottery ticket, forbidden by the police laws of nearly evry state, which only promises to pay upon the remote contingency of a successful drawing, can be an article of commerce, then a contract of insurance, which promises to pay upon a contingency which must surely happen, must *a fortiori* be a subject of commerce. . . . It is significant, although the opinion of the minority justices referred at length to Paul *vs.* Virginia, and subsequent cases as inconsistent with the de-

[10] This decision was dissented from by Mr. Justice Field, who upheld the decision of Paul *vs.* Virginia, and urged the necessity of leaving with the states the power to control corporations transacting business within their borders. He argued that "By the decision now rendered, congressional legislation can take this control from the state, and even thrust within its borders corporations from other states in no way responsible to it."

cision of the court, the opinion of the majority made no attempt to suggest a logical distinction between a policy of insurance and a lottery ticket; and it may be fairly contended, therefore, until the Supreme Court declares otherwise, that the lottery cases have overruled Paul *vs.* Virginia, at least to the extent that the former case held that a policy of insurance could not be a subject of commerce."[11]

The supporters of national supervision, however, do not confine themselves to showing that the authority of Paul *vs.* Virginia has been impaired by subsequent decisions, but also contend that in neither this nor in any of the other cases is there any record to show that there was any thorough consideration of the facts regarding the character and uses of insurance or the operation of the business. Such a consideration, they say, will show that instead of being a mere incident of commerce as the court has decided, insurance is unquestionably commerce itself or an inseparable element of commerce, as that term is commonly used; moreover, that the court in deciding Paul *vs.* Virginia and subsequent cases, labored under a misconception of the facts governing the operation of the insurance business.

A closer examination will show that this contention is well substantiated by facts. It requires little argument to prove that insurance fundamentally underlies all business, and that it is inseparably interwoven with our whole commercial life. Marine insurance, for example, is considered an indispensable necessity by all oversea merchants, and in one form or another has become an integral part of nearly every maritime transaction. It ranks in importance with any other active force in influencing and controlling the employment of shipping. It serves a most useful purpose in promoting commercial transactions by vastly extending the use of credit. It is just as much an instrumentality of commerce and almost as essential to international and coastwise trade as the vessel itself.

Similarly in the case of fire insurance, the usefulness of the business to trade and industry can scarcely be comprehended. Without it the business man could obtain no credit, and would be compelled to limit his commercial transactions to the extent of his capital. With fire insurance as collateral, however, he may secure credit from the wholesale merchant or the banker to four or five times the extent of his capital, and do so at cash prices. An American cargo, for exam-

[11] North American Review, August, 1905, page 199.

ple, shipped to Europe may be balanced by a European cargo shipped to the Orient, which in turn is balanced by an Oriental cargo shipped to America—a series of transactions based solely on credit, and made possible only because this credit is guaranteed by fire and marine insurance. Illustrations of this nature might be indefinitely multiplied to show how intimately commerce and the various forms of property insurance are related. Suffice it to say that the two cannot be separated. As collateral security, the value of insurance to commerce is beyond all calculation, as may be judged from the fact that 97 per cent. of the world's commerce is estimated to be transacted on credit, and only 3 per cent. on a cash basis. As Mr. A. C. Campbell has so admirably stated:[12] "No statistics would be possible to show the extent of the fire insurance business as now practised, for those figures would need to be as large as those of all trade. There is practically no combustible property that is not insured against fire; every car of grain, every scow-load of lumber, every bale of cotton, every package of manufactured goods, from the time it assumes merchantable shape until it is entirely consumed, is thus conditionally the property of insurers. Without such a system, modern commerce would be impossible. The fire insurance policy, or the assignment of certain interest in it, is attached to the mortgage given by the farmer for money to build his new barn; the fire insurance policy is as necessary to the banker as is the warehouse or shipping receipt on the strength of which he advances funds for that magic of commerce, 'moving the crop'; fire insurance is as important to the manufacturer as is the foundation under his factory; fire insurance is, in fact, the very backbone of that part of our social life which has to do with making, moving and keeping material things."

Quite as important as fire and marine insurance is the third great branch of indemnity, namely, life insurance. Reaching out among the millions of citizens it accumulates their small savings into gigantic funds aggregating hundreds of millions of dollars to be loaned in turn or used as productive capital. In many respects life insurance ranks with the banking business as a financial institution. Being large dealers in mortgages and securities, life insurance companies exert a powerful influence upon the money market; and while not issuing notes for circulation like banks, they issue bonds and

[12] A. C. Campbell in "Insurance and Crime," page 131.

policies which partake of the same nature. Besides serving as a means of protection to the family or to business enterprises, life insurance policies may be used as collateral, because through their possession the holder can secure credit from his banker, his merchant or the insurance company.

In general, then, insurance in its various forms turns out to be the foundation of credit, and the protector of all commerce, rather than the mere incident of commerce that the Supreme Court has declared it to be. But in view of some of the other transactions which have been declared subjects of commerce by the Supreme Court, it would seem that insurance policies must likewise belong to this category. If telegraph messages, which are neither "subjects of trade offered in the market as something having an existence or value independent of the parties to them" or "commodities to be shipped or forwarded from one state to another and then put up for sale," are articles of commerce, it is difficult to see why insurance policies should not belong to the same class. If a lottery ticket, depending on a doubtful contingency and failing to meet with Justice Field's definition of an article of commerce, as laid down in Paul *vs.* Virginia, is commerce, then it seems that a life insurance contract whose fulfillment depends upon a contingency which is certain to happen, must also be a subject of commerce. But even leaving such analogies out of account, Justice Field's opinion that contracts of insurance "do not take effect—are not executed contracts—until delivered by the agent" and are therefore local transactions, does not accord with actual facts, and unduly emphasizes the importance of the delivery of the contract in an insurance transaction. As a matter of fact, in thousands of cases, insurance policies take effect the day the application is made or when the policy is signed by the policy writer at the home office, that is to say, before the policy is delivered. But it is not so much the delivery of the paper which represents the contract as the purpose contemplated in the contract which should claim our special attention. Insurance must be regarded not as the mere delivery of a policy, but as the exchange of an economic good, intangible, it is true, yet real, for a definite consideration; and here perhaps lies the difficulty in seeing that insurance at bottom is an economic good, resembling tangible commodities which are bought and sold. Insurance companies send their agents from state to state and from coun-

try to country to sell to the public for a stipulated price a certain utility, a right to be indemnified upon the happening of a contingency, or in other words, an economic good. If insurance were not a utility of actual value, there would not be so many millions paying their hard cash in order to obtain it. As has been aptly said:[13] "A contract to exchange a ton of coal for money may not be commerce, but the actual exchange is; and, by parity of reasoning, a contract to pay a sum of money for indemnity, in consideration of an ultimate return, whether certain or contingent, of another sum of money, may not be commerce, but the actual exchange of reciprocal pecuniary benefits would seem to be as much commerce as the exchange of any other commodity."

From whatever point of view we may consider the nature of insurance, it appears, therefore, to be not only an integral and indispensable element of commerce but a subject of commerce itself, as we use that term in everyday language. It is just as much a part of modern commerce as the telegraph, the telephone or transportation itself. Indeed, it is regarded as a part of commerce by nearly all the great nations, for in England the supervision of insurance is entrusted to the Board of Trade; in Austria to the Tribunal of Commerce; and in France to the Minister of Commerce. Even the Congress of the United States has declared insurance corporations as coming under the term "commerce" by legislating that the Department of Commerce and Labor should gather and distribute information regarding corporations engaged in interstate commerce, *including corporations engaged in insurance.*

Conclusion.

From the foregoing review it must appear that the mass of evidence warrants a change from a decentralized to a centralized system of supervision. Indeed, the only important obstacle in the way of such a change is legal and not economic. By its very nature insurance is a national interest, and nearly all students of the subject are agreed as to the advantages of having the business controlled by one central supervising authority. There can be little doubt that a national insurance department, if properly constituted and wisely administered, can greatly reduce the present

[13] James M. Beck in the North American Review, August, 1905, page 201.

expense of supervision, and can do much towards equalizing and lessening the present burden of taxation. There can be little doubt, too, that it is the only practicable means of creating uniformity in our insurance law and in the methods of supervising the companies. It can be made to afford better protection to policyholders than the present system, at the same time protecting the companies from arbitrary, restrictive and retaliatory legislation on the part of the several states. Moreover, as is generally admitted, it could greatly extend the principle of publicity, and could certainly be made to render more effective than the present system the supervision of that large part of the insurance business which is international.

With the single exception of the United States every nation of any importance has recognized the necessity of centralizing control over insurance. The German Imperial Statute of May 12, 1901, placed the supervision of private insurance companies, heretofore regulated by the several states, in charge of an imperial supervising office. The constitution of 1898 of the Commonwealth of Australia likewise vests the control over interstate insurance in the central government; while in France, after a thorough consideration of the subject in 1903, the insurance business was placed under the control of the Ministry of Commerce. Only in the United States is there a decentralized system of fifty-two separate departments regulating and supervising a business which might just as well be taken care of by a single department. And the only important argument which has been advanced against a change ever since 1868 and which is being used as effectively now as ever, is the doubtful constitutionality of any measure which seeks to nationalize insurance with reference to its control. But, as stated, the question of the constitutionality of such a measure has never yet been squarely presented to the United States Supreme Court for decision, because Congress has never yet legislated to that effect. In all the so-called "insurance cases" upon which the argument of unconstitutionality is based, some other immediate issue was involved. The constitutionality of a law providing for national supervision of insurance is, therefore, an untried and unsettled question, though numerous facts would seem to justify a hope that the Supreme Court would pass favorably upon such a measure. Public policy would seem, therefore, to require that Congress should at the earliest possible moment take the initiative by enacting some measure, like the Dryden Bill,

thus giving occasion for a test case. Then, if the Supreme Court refuses to reverse its former decisions and Congress is left without constitutional power to establish a law providing for national supervison, the question arises whether the evils of the present system and the advantages of the proposed system, in view of the importance and magnitude of the interests involved, would not justify the adoption of a constitutional amendment.

But in case national supervision of insurance should ever become a reality, it cannot be too strongly emphasized that the nature of the business and the interests of both insured and insurers demand that such supervision should be taken entirely out of politics, and should be entrusted to men who are chosen for their special fitness rather than party allegiance. Few departments of government involve greater responsibility and come into closer contact with the interests of so many millions of people as the insurance departments. Insurance is a technical business which requires that those who look after its financial condition, prescribe its investments, recommend legislation and otherwise regulate the business, should be men with special training and with long experience. Yet under the present system of state supervision this all-important requirement has been largely disregarded and insurance departments have in most cases assumed a distinctly political character. "It will be seen," writes Mr. S. H. Wolfe in a recent article,[14] "that the supervising officer is part of the political machinery of the state, and the besetting sin of American civic government—the political pull—is responsible for whatever lack of efficiency there may be in this important branch of the state government. It is an unfortunate fact that this office, which comes into such close and vital relationship with the interests of so large a number of citizens should be handed out as a reward for political services. It must not be understood that this is a sweeping condemnation of all insurance departments or a denunciation of every insurance commissioner, for some have appreciated the importance of their duties, have cast off all political yokes and affiliations, and have succeeded in reforming serious evils which existed in the business. It is merely a criticism of a system which takes men with no technical education, places them in charge of one of the most important bureaus, and then, without regard to their honesty, efficiency or record, sweeps them out of office and hands their posi-

[14] North American Revie , July, 1905.

tions to some new, inexperienced man as a reward for political services rendered at the last election. This condition of affairs is to be found in nearly every state in this country. . . . To expect a man trained in other walks of life to develop suddenly into a competent supervisor, is to assume the impossible. Life insurance is a huge structure and its erection must be watched by competent eyes."

Simply to substitute a national department for a large number of state departments without eliminating the present political character of the office, may only be laying the basis for a repetition of many evils which it is now sought to overcome. Centralized supervision, if properly organized and applied, makes possible certain reforms which cannot be realized by attempting to unify the action of half a hundred independent and often hostile legislatures and insurance departments. Quite as important as centralization in supervision is the necessity of making certain that the supervising officers are strong, efficient and politically independent. Only by combining centralization of supervision with these other factors can real and lasting reform be accomplished.

THE DISTRIBUTION OF SURPLUS IN LIFE INSURANCE: A PROBLEM IN SUPERVISION

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Madison, Wisconsin.

The scandals that have been brought to light recently in the insurance field, have drawn especial attention to the question of government supervision. What are the duties of a state in matters of insurance, and how can those duties be most efficiently exercised? How far should the government, state or national, go in the matter of restricting or regulating the right of contract on the part of the public, and how far should the government go in regulating or restricting the operations of the companies? These are questions that both policyholders and those charged with the duties of supervision may well ponder over.

We cannot in a brief paper of this kind, discuss the entire question of supervision in its manifold duties and forms, but will direct our attention to the question of distribution of surplus, and the solution that seems feasible and efficient. In a discussion of this question, we naturally turn to the controversy between Zeno M. Host, the Wisconsin commissioner, and the Equitable Life Assurance Society of New York. The Equitable was organized in 1859 by Mr. Henry B. Hyde, then a young man twenty-five years of age and employed as a clerk in the office of the Mutual Life. He made his plans known to the president of that company and asked for his opinion as to its feasibility. This aroused the ire of the venerable president, for it was rank treason in his mind for a subordinate in that office to even think of starting a competing company. Mr. Hyde was threatened with immediate dismissal if he persisted in his plans. But, without going further into details, the Equitable was organized and located in the same building one story above the office of the Mutual Life. The new company was to be "mutual with capital stock." This is, strictly speaking, a contradiction of

terms, for there can be no stock in a purely mutual company. The plan was to have $100,000 capital stock on which the stockholders were to receive 7 per cent. dividends; the remainder of the earnings was to be divided among the policyholders. This is known as the "mixed" company plan. The stockholders elected the directors and had virtually complete management of the company's affairs. A majority of the stock of the Equitable was until recently held by the Henry B. Hyde estate, which was thus given absolute power to choose the directors of the company and indirectly to manage the investment of the company's funds now exceeding four hundred millions.

The shares owned by Mr. Hyde were left by his will in the hands of trustees until his son, James H. Hyde, should become thirty years of age. The trustees were James W. Alexander, the president of the Equitable; James H. Hyde, first vice-president and heir, and William H. McIntyre, a trusted friend of the elder Hyde. These trustees had the power to vote a majority of the shares in the election of directors, but Mr. Hyde had a veto on the action of the other two, so that, although he could not compel absolutely the election of his choice he could compel the election of directors that were acceptable to him and would do his bidding. This is one of the bones of contention. Many leading authorities hold that the stock should be retired and the management of the company turned over to the policyholders, as has been done in several instances, notably the Phœnix Mutual and the Germania Life. The former retired the stock absolutely, while the latter retained the stock, but gave the policyholders the right to vote at the annual meetings. This is one of the things contended for by Mr. Host, and it is certainly in accord with good business principles. But it concerns only indirectly the question at hand, for deferred dividend policies have been issued by purely mutual companies as well as by stock and mixed companies.

In its competition with other companies for business the Equitable began early to specialize in deferred dividend contracts, about 85 per cent. of its business being of this class, *i. e.*, with distribution periods exceeding five years, most of them being fifteen or twenty years. The legality of this kind of policy was never questioned until Dr. William A. Fricke became insurance commissioner of Wisconsin and he did nothing to test its legality during his term of

office. Not only did he, but every commissioner before him, and Commissioner Giljohann for four years after the expiration of Dr. Fricke's term of office, issued certificates declaring that the Equitable had complied with the Wisconsin law relating to companies operating on the legal reserve plan. In 1902, however, Dr. Fricke issued a book in which he severely attacked the deferred dividend contract and cited the Wisconsin law of 1871 as forbidding the deferring of dividends for more than five years. The law reads as follows:

> "Every life insurance corporation doing business in this state, upon the principle of mutual insurance, or the members of which are entitled to a share in the surplus funds thereof, may make distribution of such surplus annually or once in two, three, four or five years, as the directors thereof may determine. In determining the amount of the surplus to be distributed there shall be reserved an amount not less than the aggregate net value of all outstanding policies, said value to be computed by the American experience table of mortality, with interest not exceeding 4½ per cent." (Section 1952, Statutes of 1898.)

Dr. Fricke cited a large number of cases in support of his contention that this law was mandatory, that the word "may" should mean must, etc.

In December, 1902, only a few months after the appearance of Dr. Fricke's book, a policyholder of the Equitable filed a petition in the department of insurance, setting forth that the company had not complied with this law, in that it had not distributed the surplus within five year periods. Mr. Giljohann, who was then commissioner of insurance, declined to take action, on the ground that his term of office had almost expired, and that the matter had better be left entirely to his successor.

When Mr. Host became commissioner, in January, 1903, he granted a hearing to the petitioner, at which both parties were represented by able counsel. On July 31st following, Mr. Host ruled that the company had not complied with the law and gave notice that he would revoke its license unless it filed with him a statement within thirty days declaring that it would comply with his construction of the law. The company did not file such statement, but on the contrary applied to the court for, and obtained, a temporary injunction restraining the commissioner from revoking the license of the company. The case was then heard on its merits

in the Circuit Court for Dane County, and Judge Dunwiddie held that section 1952 was mandatory and that the company *must* distribute the surplus at least once in five years, or in other words, that the deferring of dividends for a longer period than five years was illegal. The company appealed the case to the supreme court, where it was reversed by unanimous decision, directing the lower court to issue a permanent injunction to restrain the commissioner from revoking the license of the company to do business in Wisconsin.

Attempts were made by the attorney-general and the insurance commissioner to get a new trial, but this was denied by the court. A bill was then introduced in the legislature and passed, amending the law, so as to require distribution within five year periods, so that there can now be no dispute as to the meaning of this section.

The query is naturally suggested, what are the arguments for and against the deferred dividend contract? In favor of such contracts, and against short period distribution, it is argued, first, that surplus is necessary as a safeguard for the solvency of the company. The reserve is of course the *standard of solvency*, and in theory the reserve will make good every contract issued, but a working company must also have a surplus, otherwise the reserve would become impaired immediately; hence this resolved itself into a question of *how much surplus* shall be kept on hand to make an adequate safeguard in addition to the reserve. Second, it is argued that deferred policies have been profitable to their holders. The argument that money will double, treble, quadruple, etc., by compound interest has been used with all possible force. In addition to this increase by compound interest, it is argued, that the persistent policyholder will also receive the gain from the forfeitures of lapsed policies. Third, it is argued, that the deferring of dividends will in a large measure prevent lapses, by making the policyholder feel that if he stays to the end of the period he gains, but if he drops out before maturity he loses. Fourth, it is argued that it is a matter of right of contract, that any one has a right to take such a contract if he chooses. This argument is advanced by many of the best authorities on insurance in the United States. In this connection the opinions of the insurance commissioners of the various states are of especial interest.

Mr. Hadley, the deputy commissioner of Michigan, writes: "I do not believe in a law compelling companies to distribute their

surplus at least once in five years. I think that that is a matter to be regulated by the terms of the contract."

Mr. Cole, of Mississippi, writes: "The only thing that the law should undertake to do, in my opinion, is to see that the companies fulfill their contracts rather than undertake to prescribe contracts for the companies."

Commissioner Drake, of the District of Columbia, who was for two years deputy superintendent of insurance of Ohio, and the technical official of that department, writes: "While I have favored and radically advocated for the past thirty-five years—after policies become non-forfeitable—the annual distribution only of surplus, yet I do not approve of Commissioner Host's course toward the Equitable, . . . for the reason that it seems to me that inaction along that line for so many years by his predecessors had established a precedent that time and usage had caused to become law within itself."

Says Mr. Monroe, of Arkansas: "I think people taking insurance should be allowed by law to make contracts to suit them. A state makes a mistake when it undertakes to say to her citizens that they must not make any kind of a contract unless the making of such contract injures some other citizen."

Says Commissioner Young, of North Carolina: "It occurs to me that where a proper and reasonable contract is made between an insurance company and its patrons that the law should allow the complete carrying out of the contract, and should not, in my opinion, unnecessarily interfere with or 'cramp' them in their dealings."

Commissioner Upson, of Connecticut, writes: "In this state the law does not require such a distribution, and I do not believe that such a law should be enacted."

From the Illinois department we have this reply: "The law of this state provides that a life insurance company may make distribution of such surplus once in two, three, four or five years, as the directors may from time to time determine. The appellate court of this state has held, 97 App. Rep. 555, that this provision is not mandatory, but permissive."

Commissioner Durham, of Pennsylvania, says: "I do not believe that the matter needs any legal regulation, but should be left to be regulated by the terms of the contract between the company and its members."

Commissioner Gray, of Rhode Island, says: "I am inclined to

the belief that such a law, if it should impair the obligation of their contracts to the extent of requiring them to change any of the terms of that contract would be unconstitutional."

Commissioner Dearth, of Minnesota, writes: "I can see no good reason why an applicant for a policy of insurance in any company should not have the legal right at least to accept any form of contract from the company as might be deemed desirable, or to his mutual interest, so long as such contract is not against good public policy or does not interfere with the rights or interests of any other party."

In Oregon, Tennessee, Iowa, Vermont, New Hampshire, Virginia, Colorado, Ohio, Arizona and Canada: "There is no such law." "The question has never been raised;" and the commissioners decline to venture an opinion.

Since the above replies were received, however, Commissioners Folk, of Tennessee, and Cutting, of Massachusetts, have expressed themselves in favor of short term distribution in their reports.

From Nevada alone comes an answer in favor of Commissioner Host's contention for short period distribution of surplus, and the only reason given for the answer by the commissioner of that state is that he has read Mr. Host's brief on that subject.

Thus it appears that nearly all the commissioners of insurance in the United States are opposed to the stand taken by Dr. Fricke and Mr. Host. Even those who have declined to venture an opinion on the subject say this much, that there is no such law in their states, and that the question has never been raised. Some of the commissioners have expressed themselves as being in favor of compelling the companies to "render an account of their business" at short intervals, but there is a vast difference between such accounting and mere distribution of surplus at short intervals, for, while the law prescribes a minimum amount to be kept as reserve, it does not prescribe a maximum, nor does it forbid the setting aside of a part of the surplus as a so-called "special reserve" which is merely a subterfuge to evade the law. It should also be remembered that an account is rendered every year in the annual statements required to be filed with the commissioner of insurance, and if the data contained in such statements are insufficient to show the results to policyholders, then the commissioners should call for and publish such additional information as is necessary to show the financial

strength of the companies, their methods of conducting the business, and the actual results to policyholders, for the surplus is a part of the savings bank feature of life insurance, and if it is carefully invested and handled by honest and efficient financiers at an expense commensurate with the service rendered, then it matters not whether it is distributed once in five years, once in ten years, or once in twenty years.

The arguments against deferred dividend contracts and for distribution at short intervals are as follows: first, if a person dies or lapses his policy before the end of the period, he loses the surplus accumulated up to the time of death or lapse. That is, if the policyholder had taken an annual dividend policy he would not forfeit so much as on the deferred dividend policy. This argument is perfectly good as far as it goes, but carried to its logical conclusion, it would forbid the issuance of all limited payment life policies and all kinds of endowment policies, for in the event of death the pure term policies would be the best, because the policyholder would have paid in less money on that plan than on any other, and the amount of indemnity would be the same. In case of death the policyholder loses the reserve on limited payment life and endowment policies, and this amounts in most cases, to much more than the surplus on any kind of policy.

Second, it is argued that the accumulation of a large surplus leads to extravagance in expenses. In this connection we need only mention the high salaries, the ornamentation of buildings, the prizes, bonuses and extra commissions given to increase the volume of new business. But, to ascribe all this to the accumulation of surplus is not warranted by the facts. It is perhaps true in part that a large surplus serves as an inducement to extravagant expenditures, but the same extravagance is found in companies that do not accumulate a large surplus. This was clearly shown by the investigation of the Washington Life. In that company, the surplus had been very low for many years, ranging from 3 to 5 per cent. of the assets, while the surplus in other companies ran from 10 to 25 or 30 per cent. The extravagance revealed by the investigation of the Washington Life was a surprise even to those who were well informed. It has been stated, somewhat humorously, that under the old management the surplus was squandered so fast that it did not have time to accumulate. If the statement is true that "the deferred

dividend contract is the root of all the evils in life insurance," then a company which distributes its surplus annually should be free from those evils. What are the facts? One company which claims to be a purely annual dividend company, shows an increase in salaries far greater than that of the business of the company. The per cent. increase in the various items from 1893 to 1904 was as follows:

1.	Insurance in force	59.35 per cent.
2.	Gross income	59.75 per cent.
3.	Surplus	18.21 per cent.
4.	Assets	63.63 per cent.
5.	Commissions to agents	60.37 per cent.
6.	Salaries	74.23 per cent.

The increase in salaries in this case is entirely out of proportion to the other items, and yet it is claimed to be a purely annual dividend company. The same extravagance is also found in some of the assessment companies that have neither reserve nor surplus accumulated. The expenditures of some assessment companies has risen to such an extent that the legislature of the State of New York, in 1905, found it necessary to pass a law limiting their expenses. How the accumulation of surplus can be responsible for the lavish expenditures of such associations has not been explained.

Third, it is argued that the accumulation of surplus leads to the misuse of trust funds in speculation and investment for the personal profit of the officers. This is also true in part, but in part only, for the entire reserve may be thus misused, provided it is made to earn sufficient interest to comply with the law. For example, if money will earn in the market, say 5½ per cent., and only 4 per cent. is required by law to maintain the reserve, there is a margin of 1½ per cent. Thus, the financiers may, if they desire, so use the money as to earn 4 per cent. or 4½ per cent. for the company while they pocket the balance. This may be done by direct personal loans, by deposits in banks and trust companies, and borrowing from them, or by the renting of buildings to favored tenants, or in a variety of ways that we need not dwell on here.

Fourth, it is argued that the charters of the companies and the laws of some states forbid the deferring of dividends for more than five years. It will be observed that the language of the Wisconsin law, before the recent amendment, was permissive only, unless it

could be clearly shown that the word "may" would have to be construed to be mandatory in order to give effect to the law. The supreme court held that it was permissive only and the same construction was put upon a similar law in the State of Illinois. But in the Wisconsin case it was argued that the context of the law made it mandatory on the theory that a corporation can do only that which is specified. The law specified that distribution might be made within five years, but said nothing about longer periods, hence it is claimed that the word "may" applied only within the five-year period. The court, however, did not admit the force of that argument.

The company also relied on a section (87) of the laws of New York passed in 1868, which reads as follows:

> "Any domestic life insurance corporation which by its charter or articles of association, is restricted to making a dividend once in two or more years may hereafter, notwithstanding anything to the contrary in such charter or articles, make and pay over dividends annually, or at longer intervals, in the manner and proportions and among the parties provided for in such charter or articles."

The commissioner denied that this law had any effect in Wisconsin, but if it modifies or alters the charter or articles of association in any way, and the Wisconsin law provides that the companies shall conduct their business according to their charters, then it must have some force even in Wisconsin, and it is difficult to see how the supreme court could hold otherwise than it did.

Another case which is of special interest at this time, is one brought against The Independent Order of Foresters, decided recently by the supreme court of Missouri. In that case it was held that the policy, after three payments had been made, had an equity in the surplus of the association that gave it a surrender value, which carried the policy beyond the date of lapse. In this case, it may be said, the court decided according to what *ought* to be the rule. In the Wisconsin case, the court decided according to what *is* the rule in law and practice, but did not necessarily aim to set up an ideal.

But the controversy is by no means limited to Wisconsin. It is of national and international importance, for the three largest companies are doing business in all parts of the world. The con-

troversy now going on in New York offers a great deal of food for reflection. But that has been sufficiently aired in the press to make a review of it in this connection unnecessary. Suffice it to say that the exposures that have been made show clearly that there are numerous defects in the state laws and that there has been a great deal of the sin of omission on the part of state officials, but it also shows with equal clearness that the policyholder has been grossly negligent with respect to his own interests. Seldom if ever does he read his own policy, or scan the annual statements of his company, but what is worse he never attends the annual meeting, even if he has an opportunity to do so. At the annual meeting of one of the large companies, only eleven members were present, though about eight hundred thousand had the right to vote. The great distance between the policyholder's residence and the company's home office makes attendance at the annual meetings impracticable, besides it would be impracticable to conduct business if such large numbers could be present. The result of this condition of things is that a few men have gained control, and the policyholder, the one who above all others has an interest in the company, has lost hold of the purse strings.

From these facts, and from statistics that are easily obtainable, to show the trend of dividends, expenses, earnings, etc., it appears that the deferred dividend policy is not the source of all evils in life insurance, although that assertion has been made repeatedly by men who ought to be well informed. Nor is the deferred dividend policy an unmixed evil in itself, for, in well managed companies, such policies have been even more profitable than annual dividend policies, and as far as the gambling element is concerned it is not even as bad as the forfeiture of the reserve in high priced endowment policies in case of death.

The root of the evil lies much deeper than the mere question of distribution of surplus. Comparing expenses of companies issuing nothing but annual dividend policies, with the expenses of deferred dividend companies, we find no material difference. It is argued with a great deal of force that deferred dividend policies have been disappointing to their holders, but the same is true of annual dividend policies. The dividends on an annual dividend policy should increase from year to year, with the increase in the amount invested, as they do in conservative and well managed com-

panies. But numerous cases can be cited where the dividends on such policies have been stationary or even decreasing from year to year. What, then, is the remedy? First of all, there must be publicity. Publicity has indeed been coming during the last few months. The trouble is that it smacks so much of yellow journalism and that the statistics published have been so poorly digested. Rumors have been stated as facts, and figures have been cast together to make a showing—anything to make an article under a "scare head" to sell the paper.

Comparisons have been made almost entirely on the basis of premium receipts and growth of business. This is both illogical and unfair. In one of the magazines, which is publishing a series of articles on insurance, there appears a table showing the percentage of dividends to premium receipts in the three large New York companies and the percentage on the same basis of the Phœnix Mutual of Connecticut. The percentages are as follows:

Equitable	9.39 per cent.
Mutual Life	11.60 per cent.
New York Life	9.54 per cent.
Phœnix Mutual	19.04 per cent.

The difference between the Phœnix Mutual and the New York companies is indeed striking. But does it mean anything? Percentages corresponding with those given above for the Connecticut Mutual and the Michigan Mutual are 25.50 per cent. and 20.90 per cent. respectively, while in another company, which is in good standing, the percentage on the same basis was about one-third of 1 per cent. But such comparisons are not worth the making except for the express purpose of misleading. They are dishonest and should be suppressed. They are not a true index of a company's efficiency, because one company may be rapidly expanding, while another company has a large amount of paid up policies on its books that call for large dividends, while the premiums are low, and *vice versa*. There is no single basis on which comparisons may be made with justice to all companies. The items must be separated, so as to show the investment expense per unit invested, and the insurance expense per unit, say $1,000, of insurance written or in force; the high priced endowment business and the single premium life business must be separated from the low priced life and term

business, because each class of business has expense items and ratios peculiar to itself. Among these may be mentioned the relatively high commission paid on life policies compared with the commissions on endowment policies; the high commissions on new business as compared with renewals, and the high investment expenses connected with endowment insurance as compared with ordinary life and term insurance. The importance of these points will be seen when it is considered that in one company the percentage of endowment insurance to the total in force is several times as high as in other companies; that in one company the new premiums exceed the renewals, while in another company the new premiums are only about one-tenth as large as the renewals, and so on. These are distinctions of vital importance to an intelligent understanding of the insurance business as it exists to-day, and it is high time that the correspondents of the daily press take pains to analyze their statistics, if they desire to be of real service to the public. If the statistics published were cast into intelligible form, and presented so as to show the true and final results to policyholders, much of the present abuse in life insurance management would disappear.

But publicity alone is not sufficient. There must also be effective control by the policyholders, and this can be brought about in either of two ways, viz., by a representative system of government similar to that now in vogue in most of the fraternal associations, or by the Australian system of voting through the mails. It is not intended here to uphold fraternal insurance as it exists in the United States, for the system of raising funds by post mortem assessments has proven a failure. But the representative system has much to commend it. It is at the very foundation of the American governmental system, and has worked well in thousands of associations of various kinds. The only drawbacks are the expense of attending meetings, and the danger of representation being lost on the way, as has been the case, only too often, in political conventions.

The Australian system of voting is as follows: Every candidate for an office in the company must announce his candidacy before a specified date. A list of such candidates is then sent to each member qualified to vote; he marks the names he desires to vote for, and returns the list in a sealed envelope to the home office, where they are all opened and counted on a certain day fixed for election.

This method is economical and gives all members a voice in

the election, but it does not afford opportunities for discussion, and this is no small advantage in the representative system. The Australian system may still offer opportunity for corruption in elections, but the counting of the votes could undoubtedly be so safeguarded as to reduce this danger to a minimum.

With a system of company management that would make the officers directly responsible to the policyholders, much of the abuse in insurance management would disappear and the necessity for government supervision of any kind would be greatly lessened. But government supervision has come to stay, and there is need for its strengthening and expanding. The great lack of uniformity in the state laws, the duplication of work by many departments where one is sufficient, as well as the laxity and incompetency on the part of some state officials, point more strongly than ever to the necessity for national supervision of all companies doing an interstate business.

BRITISH AND AMERICAN TRADE UNIONISM

By William English Walling,
New York City.

Friends and enemies of trade unionism in this country have alike assumed that the unions of Great Britain are a more highly developed form of labor organization than the unions of the United States. Undoubtedly any scientific or historical view of the labor movement in the United States must be based on a study of the British unions. There is no question that the union idea came to us not from the Continent of Europe which is furnishing us a large majority of our working people to-day, but from Great Britain which gave us our people and our institutions over a hundred years ago. Nor is there any doubt that the labor movement reached a very highly developed form in Great Britain some years ago before it had attained any considerable strength here or even before it had spread to any considerable proportion of our trades and industries.

But is it not true that the American unions are developing toward the British type, but quite the reverse. Just as America leads Great Britain in industrial development, in the enterprise and aggressiveness of her employers, so she is beginning to lead Great Britain in the intelligence and thoroughness of her organization of labor.

What is most important in the study of the labor movement of the United States to-day is not the similarity, but the contrast between the British and the American unions. The failure to see that the British form of trade union has not only ceased to advance in the United States, but is decaying both relatively when compared with the newer types of unions and also absolutely furnishes the only adequate explanation of a series of the most radical misinterpretations of the American labor movement that seems to have no end. What are the features of the trade unions of Great Britain most vented in public discussions of the labor question to-day?

Large accumulated funds and insurance benefits. The effort to preserve the proportion of intelligent and skilled workers in the industry against raw and inexperienced recruits. The general absence of closed shop agreements. These features are paraded by the friends of labor in this country as evidence of the merits of trade unionism where it has reached its most developed form. On the other hand, the equally British policies of restriction of apprentices, opposition to the subdivision of labor, restriction of output (to afford work for all the members of the union), indirect restrictions of machinery (through the demand that wages paid for the workers on new machines be so much increased that the introduction of the machines is automatically limited), are held up by the enemies of the unions here as the horrible example of what is in certain store in the future for the United States. Both enemies and friends have failed to see that the two movements having the same name and the same country of origin have come to rest on principles as widely divergent as the political and economic institutions of Great Britain and the United States. Both movements are to be sure primarily economic rather than political in their character, both are built on an organization of labor by trade or industry rather than an organization by locality, both are seeking first of all more wages and shorter hours, and both rely largely on the strike. But here the similarity in essentials seems to cease. The two movements differ in the origin of their power, in the form of their organization, in their tactics and in their ultimate aim.

In claiming that American unions are developing toward the British type, the friends of unionism in this country in so far as they have any influence at all on a movement that is so deeply economic and unconscious in its character, pledge it to the narrow sectional or "trade" policy of its British prototype. The fundamental principle that underlies every one of the policies that characterize these unions, whether good or bad, is the effort to gain and maintain a monopoly of the skilled workers in a given industry or trade.

The unions of Great Britain are, with relatively few exceptions, "trade" unions in a distinct narrow sense. *They are founded not so much on the principles of the organization of employees against employers as on that of the organization of a certain grade of labor against all other grades.* The principle is one of monopoly. Hon.

Carroll D. Wright defends this monopoly as "the vested interest" of the worker in that trade in which he has put so many years of his life. And from this point of view alone can the monopoly be defended. But it must be remembered that the consumer, that is to say the community, rather than the employer must usually pay the bill, and it will be conceded that if any other method can be arrived at by which the worker's condition can be protected without causing any monopoly, without raising prices to the consumer, and without excluding the unskilled laborers who are constantly clamoring for work and to whom the community certainly owes an equal debt, it would be better for the skilled worker, the unskilled worker, the consumer and the whole community alike.

The attempted monopoly of skill fostered by the British unions has been the essence of their being. By the direct restriction of apprentices in the trade, by refusing to allow them to enter the union and benefit from its advantages and by the opposition to the division and specialization of labor, involved in their insistence that the apprentice shall learn "all the trade," the British unions attempt to maintain a monopoly of the skilled men. This policy militates against all improvements in industry that are based on the attempt to save the labor of skilled and exceptionally intelligent and trained men by substituting men of less training and skill where this can be economically accomplished.

The British unions widely encourage the restriction of output. By restriction of output we mean an unwritten law of the working people that limits the amount of work a man should do. The fact that the unions did not invent this law, but the individual workers themselves, does not relieve them from the responsibility for its enforcement. The unwritten law can be made effective only when the employer's discipline is broken down by the counter-discipline of the union. The British unions find it a most convenient means of securing a monopoly of labor. Having secured control over the amount of work done, they attempt by doing less work to secure jobs either (1) for union men out of employment through no fault of their own, or (2) for relatively inferior union workmen. This system has also been further developed into a conscious attempt not only to secure the employment for all the union's unemployed, but (3) even for the far more momentous purpose of bringing about a scarcity of labor. As soon as this point of scarcity approaches,

the wages of labor tend to rise by the natural economic law of supply and demand, the union enforces the recognition of the conditions of the labor market and has the employer and the industry at its command.

Not only do the greater number of the British unions commonly seek a monopoly of skilled men and a monopolistic control of the amount of work to be done by these men, but they also seek to obtain a partial monopoly of the benefits of industrial progress. Those unions where machinery is being most rapidly introduced always deny that they have restricted the machine, and their denial is true if taken in a narrow sense. But they do claim that because certain industrial processes which are due to the scientific or technical advances of society at large have happened to strike their industry, they and no others should obtain a large share of the benefit of these processes. On this ground they demand, when their men are put to work on new or better machines that they should secure considerably better wages even if the work to be done is simpler in its character than what was done before. Or they restrict the number of machines at which a man is allowed to work on the ground not that the machines ought to be prohibited, but that they should not be introduced so rapidly as to throw a large number of men out of employment.

To these grounds for restriction of output, a fourth, the most dangerous of all, has recently assumed a new and threatening importance. In recent years since the complete failure of the great engineers' strike which cost the British unions such an immense sum and since the epidemic of adverse decisions in the courts have tied up union treasuries, strikes have grown more and more infrequent and unsuccessful. Notwithstanding the large accumulated funds of the unions, it has been found that the even greater financial resources of the well-organized employers' associations, backed as they have been recently by the financial community and the courts, have enabled them to hold out either until the working people were starved into submission or until new hands were trained into the industry. But the strike is not the last resource of a laboring population that cannot be physically coerced to labor. Since the strike as the chief weapon of unionism has begun to fail, the Ca Canny system has come to take its place. This term is simply the British expression for the restriction of output when socially enforced by the

working people who call out the Scotch word "canny" to their fellow workers when they are of the opinion that these latter are working harder or faster than necessity or good policy dictates. But the term has become more specialized recently than this definition would indicate. It has come to stand not so much for the restrictions above mentioned made for the hopeful purposes of increasing employment or creating a scarcity of labor as to those desperate reprisals of men who have been beaten in a strike and who say, "if we cannot increase the amount of our pay no power on earth can prevent us from decreasing the amount of our work." It is not an ordinary businesslike attempt to secure a monopoly, but a new form of revolt far more dangerous to industry and the employer than the strike itself.

Now, the development of the American industry and the flooding of the American labor market with cheap foreign labor has proceeded at such a pace that any and all of these restrictive policies are forever impossible in this country upon any such scale as they have been practised on the other side. The relative success of the British unions in securing these various monopolistic charges, as against other unorganized workmen and society at large, is due fundamentally to one fact alone, the greater importance of manual skill in British industry.

The unions of Great Britain were founded at a time when manual skill was of much greater importance than it is in Great Britain to-day. In America the demand for this sort of skill has to an even greater extent been replaced by a demand for men without any special manual skill, but with an intelligent grasp of the rudimentary principles of machinery, a ready adaptability to the ever-changing tasks of a machine age or to that great mass of unskilled work, handling of raw materials and products and other simple tasks that have also been created by the machine development.

In a former article[1] on the importance of unskilled labor in the United States, we have shown the underlying economic causes of this development. It is only necessary now to point out that this economic development has been followed by corresponding changes in the form and organization of the labor unions themselves. The conclusions of the previous article were briefly that new machinery and the subdivision of labor were increasing the proportion of

[1] The Annals, Vol. xxiv, page 296.

relatively unskilled labor in all the leading industries, that the new skilled trades demand intelligence and responsibility rather than manual skill, while the new unskilled trades demand speed and nervous intensity rather than mere physical power and endurance as before. It was seen that the division of an industry into a hundred instead of half a dozen branches had forced the unions of the many trades of each industry into one new type of organization, the industrial union. It was also seen that the difficulty of bringing machinery into certain kinds of work common to all industry such as teaming and driving, machine repairing, steam engineering, firing, etc., had increased the numerical ratio of the workmen in these relatively unskilled trades and caused the formation of new trade unions extending not through one or two industries as formerly, but covering practically the whole industrial field. All of these tendencies have had their effect on the form of labor organization that has developed in the United States until it has grown into such a different thing from the unionism of Great Britain that the economics and history of trade unionism in that country have become comparatively useless for ours.

The British unions have practically failed to organize unskilled labor on any considerable scale. With a few exceptions the only methods by which the British labor movement has been able to organize the unskilled has been through the large "common labor" associations, the so-called new unionism, a form of labor organization practically unknown in the United States. Here, a better policy has brought much better results. The inter-trade "industrial unions," after organizing the skilled, have succeeded in organizing many of the unskilled trades of several industries, while the inter-industrial "trade unions" have organized in some localities nearly all the workers of some trades even in industries where no unions of skilled workers have secured a foothold. Common laborers, women and newly arrived immigrants, have in this way been brought together with older and more skilled men into one organization instead of being left alone as in Great Britain to struggle along in a weak or temporary union of their own.

Of the "industrial" unions of America, that of the coal miners with more than a quarter million members is by far the most important. But if we add to this membership that of other purely industrial unions, such as the butchers with 34,000 members, the

iron and steel workers with 13,000, the carworkers and piano workers with about 10,000 each, the paper makers with 8,800 and the potters and carriage and wagon workers with about 5,200 each, we have 87,000 in addition from seven unions alone. Other industrial unions that owe their success partly to the label are included in another reckoning below. If added to the above, we would have a total of 500,000 unionists in the industrial form of organization. Nor is this all. Those federations which are not purely local are industrial in their nature. If we were to add the industrially federated building trades of more than half a million members, our total of industrial organization would considerably exceed 1,000,000 members. And the work of a considerable majority of the membership of most of these unions is to be classed as relatively unskilled.

The membership of the corresponding unions in Great Britain is less in some cases and in all it is more or less along trade rather than industrial lines. There are no special unions of any importance among the butchers, brewers, car workers, piano workers or carriage workers, while that among the iron and steel workers is confined largely to the smelters. Their membership is a fraction of that of the corresponding unions in the United States. The building trades, without any national central organization, are split up into numerous local groups, of which the thirty largest do not contain half of the whole. The largest of several federations of coal miners' unions still leaves a third of the unions outside, while the principal power is in the hands of at least ten different unions, besides a large number of small ones. Finally, the less skilled workers about the mines are either separately organized, even if admitted to the federation, or ignored entirely, while the miners are all relatively skilled men, since neither the machine work of our bituminous fields nor the subdivision of labor which has brought unskilled labor into the anthracite regions has yet come into use. If half a million coal miners are organized in Great Britain against half that number in the United States, the coal mining industries being about the same in both countries, it is partly because the work of each miner goes so much further here on account of the better methods of work, and because there are several hundred thousand less miners in the United States.

Another means by which American unions have organized the unskilled is through the new type of "trade" union that flourishes in

several or all industries where workers of the trade are found. In a few years the teamsters have increased to 84,000 members, of which half are enrolled in the Chicago unions alone. At the Chicago ratio 500,000 of the 600,000 teamsters in the United States may be considered as possible future members. In 1901 the six principal unions in this trade in Great Britain aggregated less than 25,000 members. Similarly the Stationary Engineers and Firemen's Unions, which numbered less than 5,000 in the United States a few years ago, have grown to 35,000 to-day. The five leading British organizations, though much older, had in 1901 only 13,000 members and the federation embraced scarcely more than 20,000.

American unions have also organized the workers in another capacity entirely—as consumers. In Great Britain the power of the working people as consumers to assist the working people as producers has been almost ignored. The only form of organization of consumers that has succeeded among the laboring masses there, has been the great co-operative societies. The relation, however, between these and the unions is not only very weak, but has at times even been strained. In America, on the other hand, we have the boycott in all its forms, often most effective, and above all the union label. Depending as it does on the number of "union" consumers, the American policy of organizing the great masses of unskilled labor is the foundation of its success. On the other hand, it is largely due to this union label or union button that about 400,000 American working people, largely unskilled, have been able to organize. The numerical strength of the more important of this class of organizations in 1904 is shown in the following table. A large proportion of the workers in most of these industries is relatively unskilled.

UNIONS WHICH DEPEND ON THE LABEL.

(The total strength of the unions in these same trades and industries in Great Britain is considerably less than 100,000, some of them having no existence there at all.)

Clerks	50,000
Hotel and restaurant employees	49,000
Garment workers	45,000
Cigarmakers	40,500
Boot and shoe workers	32,000
Brewery workers	30,500

Barbers	23,600
Musicians	22,000
Bakers	16,200
Printing pressmen	16,000
Shirt, waist and laundry workers	16,000
Hatters	8,500
Leather workers	7,100
Upholsterers	3,000
Capmakers	2,500
Ladies garment workers	2,200
	364,100

In this country we also have the federation principle developed to an extent unknown in Great Britain. Federation helps more than anything else perhaps in the organization of the unskilled. The motto of the American Federation of Labor is "educate, agitate, organize." Practically all the education in unionism, the agitation of unionism and the organization of unions accomplished in Great Britain, has been done not by any federation, but by the separate trade unions. It has therefore necessarily been along narrow lines in its principles and restricted in its application to those least in need of it. In America, speakers, organizers and financial assistance are never lacking for the new and struggling organization that has shown itself worthy of support. The organizers of the American Federation of Labor are numbered by the hundred and each year several million dollars are distributed to the weaker unions in one way or another through the national and local organizations that compose it. The federation has proven invaluable to the weaker unions in times of strikes. Not only has it made possible a far more effective financial assistance to the unions of the unskilled, but it has even brought about a good many sympathetic and even some more or less general strikes, such as those in Chicago, Kansas City, Denver and San Francisco, some of them by no means without some success.

Federation in Great Britain is, comparatively speaking, in a rudimentary stage. Hardly a fourth of the two million unionists are members through their organization of the new federation of trade unions. Only in the engineering trades, called by our workmen the iron trades, has Britain led. Here the federation includes over two hundred thousand union members. The strongest of the British

federations are not federations in the American sense at all. They are composed not of an allied group of trades, but of many unions operating either in the same trade or the same industry and ought to be a single union. So in the place of the United Mine Workers, a typical union, Great Britain has a loose federation that includes nearly all of the unions in the mining industry. The largest federation in the textile industry is not even so much centralized. It includes only about three-quarters of the unionists in the industry.

The high degree of decentralization in the British union world appears in nearly every trade and industry. The ten largest unions among the miners, for instance, embrace scarcely half the total membership, while the twelve principal unions in the textile industry include less than half of the total membership. So it is with all the leading trades. In America two unions, one far more important than the other, include practically all of what are called the engineering trades in Great Britain, while the five largest unions there include only a minority of all the union members. In America there is one teamsters' organization. In Great Britain there are five important organizations in this field and twenty small ones. There is one organization of carpenters in the United States which has more than nine-tenths of all the union carpenters in the country, while there are three important organizations in Great Britain. In America there is one important organization of seamen, in Great Britain six. In America there is one important organization of garment workers, in Great Britain six. With the wood workers the proportion is again one to six; with the longshoremen, one to seven; with the compositors, one to five; with the boot and shoe workers, one to two; with the stationary engineers, one to five; with the plumbers, one to two; with the bakers, one to three; with the textile workers, one to twelve, etc. In fact there seems to be only one important trade or industry in Great Britain in which the forces of labor are completely unified, while there are very few cases indeed in America where they are divided. The British instance is that of the very powerful union of boilermakers. The only American trades or industries where there is a division of any consequence are the machinists, the carpenters and the painters. In each of these cases the larger organization is many-fold more important than the smaller and will undoubtedly swallow it up in the near future. In each case negotiations to this end are now in progress.

The degree of division and subdivision of unions in British industry at times reaches a point that is most amazing. Especially is this the case in the metal trades where a great deal of hand work survives. So we find among the "principal divisions" of the metal trades in the report of the British Board of Trade some dozen classes of trade unions with more than one hundred sub-divisions. The classes are cutlery, file makers, silver bloaters, lock and hinge makers, wire workers, lock and bolt makers, bedstead workmen and anvil makers, to name only the more important. In the first class alone there are in Sheffield half a dozen large unions and twice as many small ones. So we have the table plate forgers, the saw makers, the spring knife grinders, the spring knife cutters, the Amalgamated Edge Tool Trade Society, and the table and butcher knife hafters, only to mention the more important. In all these trades in America only three unions are of importance—the machinists, the metal workers and the metal polishers, all on a national scale. There is a somewhat similar situation in the leather industry. In America there are only two unions of any consequence, the Leather Workers and the Leather Workers on Horses' Hoofs. In Great Britain there are a large number of organizations divided in half a dozen classes as tanning, currying, dressing and finishing, saddlery and harness, whips, etc.

As a consequence of the more narrow policy of the British unions towards unskilled labor, the total numerical strength in proportion to the number of persons employed in British industry is hardly as great as that of the American unions, although the former have the advantage of at least a generation in their age. The total number of unionists in America is probably not much short of 2,500,000; those of Great Britain are a little more than 2,000,000. But this does not tell half the story. The unions of the United States were estimated by the Industrial Commission to have had approximately 500,000 members in 1892. In 1901 they had already grown to 1,400,000. The unions of Great Britain, on the other hand, were three times as strong numerically at the former date, having a membership of 1,500,000. In 1901 this figure had risen to nearly 2,000,000. *While the membership of American unions increased nearly threefold in ten years, that of Great Britain increased less than one-third.* During the last year the tax paying membership of the American Federation of Labor rose by more than 200,000 members,

while that of other organizations outside of the American Federation of Labor increased even more rapidly, so that the total increase during this rather bad year was perhaps something like a quarter of a million, according to the union showing. On the other hand, the membership of the British unions has for several years almost stood still. In fact the official reports of the Board of Trade show a slight decrease from 1901 to 1902. Moreover, besides an increase of the membership of American unions in the most important industries up to or beyond the British level, with a few important exceptions this increase of membership has meant the organization of trades neglected almost entirely on the other side. While there are 45,000 clothing workers on men's garments organized in the United States, there were in the last report scarcely one-tenth as many in Great Britain. While in the hotels and restaurants, in the breweries and on the street railways, where American unions have secured from 30,000 to 50,000 members in each case respectively, there are in Great Britain only a few hundred union men.

Perhaps the attitude of the two movements towards unskilled labor is nowhere more clearly shown than in their relative success in organizing women. There are no accurate figures concerning the movement in the United States. But it can safely be estimated that more than 100,000 women are organized in this country. The figures for Great Britain are somewhat similar. There, in 1901, there were 120,000 women in the unions. But of these nearly 108,000 were in the textile industry alone which employs considerably less than half of the million women at work in factories. In this industry men and women both are very much better organized than in the United States, though it may be said in passing that the women are practically forced into the organization, as is also the case in many American unions.

Outside of the textile industry a most interesting situation develops. The total number of women organized in this field was, in 1901, 12,151. The total number employed in the same field even two or three years before this was shown by the factory reports to be 619,014, that is to say, the organization of women outside of the textile industry is almost insignificant. It is of interest to enter a little more closely into the classification of the 12,000 women who are organized. Of these, some 2,500 are in the hat and cap industry, which is pretty well unionized. Two thousand two hundred are in

tobacco and 1,100 in potteries, which is a fair showing for these relatively small industries; that is to say, half of this small number of 12,000 employees are engaged in three industries, leaving a little more than 6,000 union women for industries and trades employing half a million. In Chicago alone, persons familiar with the union situation, estimate there are 15,000 union women at the present moment after considerable losses caused by the reaction in industry last summer and fall.

To sum up the relative numerical strength of the British union movement and its failure with a few exceptions to organize the unskilled, the following table will be useful. If in this connection it is remembered that the growth of the British unions has almost come to a standstill in recent years, the table will speak for itself.

Union Membership in British Industry.

Industry.	Total No. Employed (1898)	Total No. in Unions (1901)
Mining	824,791 (1901)	505,023
Metals, etc.	1,325,975	334,913
Textiles	763,384	219,256
Clothing	351,622	66,291

(In the textile industry young persons and children under eighteen have been deducted from the total. In the metal and clothing trades, they are included.)

It is impossible to prepare a similar table with any pretence of accuracy for the United States, but the situation can be summed up in a general way in each of the same industrial divisions. In mining the proportion organized in the United States is very similar to that in Great Britain, or if anything, slightly better, the total number in our unions reaching more than 300,000 out of a total of some 500,000 in the industry. In the metal trades the degree of organization in Great Britain is slightly better than in the United States.

The Union Membership in the Metal Trades of the United States.

Machinists	72,300
Iron moulders	30,000
Boiler makers, ship builders, etc.	22,400
Sheet metal workers	16,300
Iron, sheet and tin workers	13,500
Blacksmiths	10,500
Metal workers	12,800
	177,800

In 1900 the total number of persons in these industries was more than 900,000. The organization in the metal trades is therefore somewhat better in Great Britain than in the United States. In the textiles, of course, the difference in favor of the British organizations is striking. Out of five or six hundred thousand persons employed (the Census of Occupations does not indicate the exact figures), the textile workers union here had last year a little over 10,000 members. In the clothing industry the situation is reversed. The American organizations, of which the principal are the garment workers, the boot and shoe workers, the shirt makers and the hatters, have nearly 100,000 members of the several hundred thousand in this industry. As indicated by the above figures, the proportion organized is scarcely half as great in Great Britain. The only important field besides those above mentioned, where Great Britain has an advantage, is in unclassified general labor. Here the gas workers' union had in 1901 some 45,000 members and other unions brought the total to 115,000. In all other industries a comparison is without exception in favor of the United States.

To sum up in a word, the British unions are on the whole as important a factor in British industry as the American unions are in the United States, but in Great Britain, with the exception of the textile industry and the general laborers, it is almost exclusively the skilled that are organized, whereas in the United States a very large majority of the total number of unionists are engaged at relatively unskilled work. In Great Britain the movement is divided both in the country at large and within the trades. In America the unity within the trades and industries is almost complete and a national unity seems to be not far distant, while already three-fourths of the unions are affiliated with the great national organization, the American Federation of Labor. Finally, the unions of the United States are growing with a startling rapidity and the growth does not seem to be a mushroom growth.

But if the American labor organizations are more democratic in their membership and more united in their organization than those of Great Britain, are not the latter richer and therefore better able to hold themselves together in adversity or better provided with the sinews of war? Are they not more solid, more practical, more successful—as measured by financial gains made for themselves or their members?

The financial resources of the British unions are considerably greater than those of the United States and moreover are increasing rapidly. The total funds of the one hundred principal British unions in 1892 were £1,573,944, in 1902 they were £4,372,178, a total increase of nearly threefold, and a per capita increase of more than 100 per cent. The income during the same period increased from £1,462,386 to £2,067,666, remaining near 35s. or about $8.50 per capita.

But what are these vast funds of the British unions? Do they constitute a war-chest, like Russia's famous hoard of gold? Can they all be used as a fund for obtaining more wages and shorter hours? By no means. As far as the union rules and legal regulations are concerned, yes, but from the standpoint of dollars and cents, no. The trade unions of Great Britain, and to a lesser extent those of America, lead a double life. They are labor organizations in the first instance, but they are also insurance companies in their principal functions, very similar to many mutual benefit societies and the industrial insurance companies of the United States. The funds though convertible to trade union uses, both by the union rule and legal right, are for the most part morally and practically pledged to be paid out in benefits.

For the ten years from 1892 to 1901 inclusive, the amounts paid by the British unions in death, sickness, unemployed and other benefits averaged 60.8 per cent. of the total expenditures, while the proportion expended on "disputes" or strikes averaged less than one-third as much or 19.4 per cent., the remainder going to working and miscellaneous expenses. The proportion varied greatly, of course. In 1893 the coal strike brought the "dispute pay" to nearly one-third the total expended and in the great "engineering dispute" it even reached 33.5 per cent. On the other hand, only 12.3 per cent. was expended on dispute pay in 1901, 10.2 in 1900 and 9.4 in 1899. In recent years while about one-tenth of the union income was going directly into the labor conflict, nearly two-thirds (64.8, 65.4 and 65.2 per cent.) was going for insurance features. And this was not too much, for the risks carried by the British unions steadily grow worse as their average membership grows older and their liabilities steadily increase.

The contrast with the American unions is striking. While death benefits are as prevalent here as there, all other forms of benefits are

less general. Three-fourths of the British unions have sick, accident and out of work benefits. Only one-third of the unions of the American Federation of Labor have sick or accident benefits on a national scale and only one-fourth have out-of-work or travelling benefits. Over a fourth of the British unions have old age benefits, practically none in the United States. The amounts paid by the unions of the American Federation of Labor are shown in the following table. The important unions outside the federation are those of the railways and the metalliferous mines, the bricklayers, the masons, the stonecutters and the plasterers, with a total membership of less than half a million men.

BENEFITS.

	Labor Unions of the American Federation of Labor.	Trade Unions of Great Britain.
Funeral	$825,687	$494,075
Sickness and accidents	756,762	1,724,170
Unemployed, etc.	151,515	1,629,330
Superannuation		1,014,760
	$1,733,964	$4,862,335

If the unions outside the federation are added, the result would be materially changed. The Order of Railway Conductors, perhaps the smallest of the four big railway unions, paid last year $835,500 more than all the unions of the federation expended on death benefits. The four big railway unions alone have expended about twice the total amount recorded by the American Federation of Labor unions. But they are in every way exceptional and more like the British organizations.

Not only are the railway unions exceptional as to their benefit policy, but so also are several unions within the Federation—especially the cigarmakers and the iron moulders. If we subtract the amounts they paid, $379,000 and $260,093, respectively, from the total above mentioned for the American Federation of Labor, it is reduced by fully one-third—from $1,733,964 to $1,093,871. But the membership of the Cigarmakers Union was only 40,500, that of the Moulders 30,000, both of them together less than one-twentieth of that of the federation. The membership of the four largest railway unions, trainmen, firemen, engineers and conductors is about 200,000. If we add to the unions just mentioned all others that have import-

ant benefit features, the plumbers, the barbers, the glass workers, the boot and shoe workers, and all those that are expending more than $2.00 per capita on benefits, we find that probably less than half a million of the two and a half million members of the trade unions in the United States are members of organizations that have established such a benefit on a national scale. In Great Britain all the great classes of the unions are paying $2.00 or more per capita. All the unions except those of general labor and transport and those of the mining and textile industries are paying benefits of from $4.00 to nearly $8.00 per capita.

The prevailing custom of the American unions toward benefits is then to leave them to the local unions or to ignore them entirely. In either case the absence of a large national treasury does not necessarily indicate that the workmen do not secure benefits. They may secure them from the industrial insurance companies, so rapidly developing in the United States, or from their local unions. What it does indicate is that the workingmen's insurance and their organization for the economic power and advancement have become two fairly separate and distinct functions in the United States.

The benefit feature is better adapted to British "trade" unionism than to the labor unionism of the United States. In the form of payment and character of the benefit, each "trade" union of course varies, adapting itself to the needs of its members. Once instituted, the benefit therefore becomes a retarding force. But the changing conditions of industry require new classes of members to enforce a successful industrial policy. The specialized benefits check the accession of these new members and so keep the trades apart. The large benefit funds being convertible to immediate use in the form of employment or dispute pay, form a vested interest of the older members that urges them to keep out the new. Many members are not unionists at all at heart, but mere policy holders of "trade" insurance.

But above all, the benefits do not compose a defense (or aggression) fund. Instead of aiding in the conduct of strikes they hinder their declaration except in those extreme cases where a man is willing not only to sacrifice himself and his family in the present for the cause, but also to give up his long hoarded protection against sickness, accident, unemployment and old age in the future, and finally to sacrifice to a certain degree his wife and children after he is dead.

As a consequence the American unions are spending twice as much per capita on strikes, to say nothing of the much greater sums drawn by individual workmen in this country from their savings in times of strikes. The sum lost in wages in strikes averaged sixteen times as much as that spent by the unions during the same conflicts during the last census decade.

For the decade from 1892 to 1901 the British unions spent an average of £919,901 per annum on benefits and only £293,552 on strikes. For the decade from 1891 to 1900 inclusive, the American unions expended an average of $831,833 per annum on strikes, while their average membership in this period was less than half as great. Lately this expenditure has increased rapidly. In 1900 it was $1,434,452, while for Great Britain it was for the one hundred principal unions £150,283. But in 1902 the unions of the American Federation of Labor alone spent $2,729,604 on strikes, in 1903, $2,932,417, and in 1904, $2,864,642. If we add to these sums those expended by the bricklayers, the plasterers, the stonecutters and the Western Federation of Miners, we may have half a million or a million more for each of these years. The sum expended by the hundred principal unions of Great Britain in 1893, the year of the coal strike, was £588,373; in 1897, the year of the engineering strike, £633,379. The American unions are then expending *steadily* on strikes a larger amount than that paid out in Great Britain in the largest strike of its history.

Eight years have elapsed since the great engineering dispute in 1897, and since that time there has been no great national contest in the United Kingdom. The amount expended by the unions on attack or defense has fallen to a bare million dollars a year, less than a third of that expended in the United States. The funds have gone on accumulating. The amount per capita doubled from 1892 to 1901, but it is still the trifling sum of 7*1*s. 8d. per capita, scarcely $18.00, a sum hardly sufficient to cover the liabilities of the unions as insurance institutions, to say nothing of their availability to carry on great labor conflicts.

During the decade for which we have figures (1891-1900), the one hundred principal unions of Great Britain expended an average annual amount on dispute pay of £293,475. As the average membership was over a million, the amount paid for strike was hardly 6s. or $1.50 per member per year. For three years the unions of the

Federation of Labor, composed in considerable part of unskilled and women workers, have averaged half as much again.

As organizations for collective bargaining the British unions are not expending more, but less for each member than those of the United States. And while the years 1893 and 1897 saw the high water mark of the expenditure of British unions on strikes, the years 1902, 1903 and 1904, during which the membership of the Britsh unions has stood still and their strike expenditure fallen as measured by the previous decade, have witnessed not only a rapidly growing membership of the unions of the United States, but an increasing expenditure for each member of the industrial conflict.

As measured either by membership or by financial power, the trade unions of Great Britain, as organizations bettering the economic condition of the working class or increasing its power in the industrial world, seem already inferior to those of the United States. Manifestly under these conditions the American unions are not going to follow in the footsteps of their predecessors, but will develop as they are developing a form of organization, a method of fighting employers, a policy toward the public and an ultimate goal of their own. They have passed out of the stage where they must look to the rest of the world for precedents and the time is coming when the rest of the world must rather look to them.

COMMUNICATIONS

A SUGGESTION FOR THE PREVENTION OF STRIKES

By A. Maurice Low, Washington, D. C.

Is an employer justified in locking out his men? Is an employee justified in striking? To these questions there can be only one answer. In this enlightened age, in this age when the relations of the individual to society and of society to the individual are so interwoven that they cannot be dissociated, the resort to brute force is as much an anachronism as would be the resort to a trial by combat. Society can only justify a strike as it justifies a revolution. It is the last resource when all other means fail. It is the last resource when conditions are so intolerable that the only relief is the remedy of the sword. History has put the stamp of its approval on a few, a very few, revolutions.

I advance the following as the rough outline for the prevention of disputes between capital and labor.

Every employer of labor employing more than say ten employees must, before engaging in business, obtain from the state a license, the terms of which are: That he will not reduce the prevailing rate of wages or increase the hours of labor until after he has served notice of his intention upon his employees and a majority have accepted the change. In case a majority refuse to accept, the question is reported to the licensing authority, matters in the meantime remaining in *statu quo*. It shall be the duty of the licensing authority to ascertain all the facts touching the nature of the employment, the conduct of the business, its profits, the cost of living, and all other pertinent facts, and if the employer is sustained he may make the change as proposed. If the decision of the licensing authority is adverse no change may be made, nor may another proposition of the same character be made within a period of three months. A violation of this clause is punished by fine and imprisonment. An employer may at any time retire from business, but in that case, and to prevent his making the law a dead letter, he may not after retiring from business engage in the same business, either as principal or agent, within a period of six months.

An employee may not refuse to continue to work for an employer in whose employment he then is, and whose salary is regularly paid to him, and whose hours of labor and conditions of employment are not in contravention of any federal, state or municipal law, for any or all of the following reasons: Because an increase of pay is denied him, or because a reduction of hours is not granted to him, or because of the employment of some other person, or because of a regulation made by his employer. If an

employee desires to leave his employment because of any or all of the foregoing reasons he must serve notice upon his employer, and if the employer refuses to accept his demand he notifies the licensing authority, matters between them in the meantime remaining in *statu quo*. It is the duty of the licensing authority to investigate all the matters touching the dispute and to render his decision on just and equitable grounds, due regard being had by him as to the prevailing rates of wages and hours in employment of like character in the vicinity, the cost of living, the profits accruing to the manufacturer, the customs of the trade or craft and all other circumstances. If the decision is adverse to the men they shall remain at work under the conditions then prevailing and may not make another similar application for a period of three months. If at the end of that period they shall renew their application, which shall again be rejected, they may leave their employment without further liability. Failure to obey the decision of the licensing authority subjects the men to fine and punishment. If the application of the men is sustained by the licensing authority, either in whole or in part, he shall serve notice to that effect on the employer, who shall at once comply with the award. Failure on his part subjects him to fine and imprisonment.

The advantages which this system would have I shall suggest later. I prefer in the first place to meet the objections which I see will be raised.

It will be doubtless urged that it is proposed to abolish the right of freedom of contract, which is a thing held sacred by all liberty loving people. That is precisely what I do propose. I would abolish the so-called right which enables a man to oppress his employees, or an employer to be at the mercy of an undisciplined set of men, in the same way that society long years ago abolished the right that a man once possessed to kill the man whose gibe had offended him. For brutality and anarchy and oppression we substitute the simple and beautiful process of the law. It is of course a radical departure. Not more radical, however, than the law of Valerius which gave to the Roman plebeian the right to appeal from the magistrate to the people. Still less radical than the edict of Constantine abolishing crucifixion as a punishment. Whatever is new is always radical, while it is new.

It will perhaps be urged that the employee instead of being benefitted by the proposed law would in the last analysis find himself worse off than before, inasmuch as if he attempted to secure an advance of wages and the decision was adverse he would be compelled to labor at the prevailing rate for the next three months; and if the licensing authority was incompetent or corrupt the decision would always be against him. If his demand is unjust, if the employee asks for higher wages than the employer is justified in paying, it is perfectly proper that the demand should *not* be granted. Employers as well as employees must for their own protection be very sure that the licensing authority is neither corrupt nor inefficient. It lies in their own hands to secure the appointment of honest and competent servants. If they prefer to be badly served rather than well served, they must not complain if the results are unsatisfactory.

Admitting, for the sake of argument, that the method proposed is sound, it will be urged that it is impracticable because it would entail more work

than could be properly performed by one man, who would find it impossible to keep himself informed as to the prevailing rates of wages paid in all the industries in a state, or to be able to ascertain whether a demand for a change of wages was justified by the circumstances.

This objection is not so formidable, when carefully examined, as appears on its face. A properly constituted bureau would have a compilation of the wages and other conditions governing employment in every branch of labor, those compilations being revised from time to time as might be found necessary by improvements in machinery and any other circumstances affecting that particular industry. The bureau would also, and without much difficulty, be able to keep itself informed as to the cost of raw materials, the wholesale and retail prices of the finished product, the general state of the market and the cost of living. Such investigations are now periodically made by the United States Bureau of Labor and many of the Bureaus of Labor of the various states. As a matter of fact, the bureaus that would be created by the passage of a law such as I propose would be able quickly, scientifically, accurately and impartially, to arrive at all the facts affecting a labor dispute, facts which state boards of arbitration and conciliation as now constituted, arbitrators in general, newspapers and the public cannot reach because they have not the machinery with which to conduct their investigation, nor the opportunity to pursue an investigation which ramifies so extensively, and in which so many elements must be weighed with such exactness if a definite result is to be reached, and not a mere hasty generalization pronounced.

It will also be urged that the law would work great injustice to the small employer, as he might be forced to pay an increase of wages or else be driven out of business.

This would be an injury to the individual, but not to society. The man who because of his lack of capital, or his lack of ability, or his lack of thrift, who, in short, is unfitted to be an employer, has no right to degrade other men, and thereby degrade society, by making those men compensate for his deficiencies by a forced levy on their brains or their muscles. That is what an employer does whose only way to keep his head above water is to pay his men less than a prevailing wage, or by exacting of them a greater stint, or by making them work in dangerous or unsanitary surroundings. The world has no use for the inefficient, the incompetent, the unfit.

Doubtless it will be said that conceding the proposed law to be a solution for admitted evils it is merely a theoretical solution because incapable of being put into practical operation. It might be easy, it will be argued, to arrest a single employer or a handful of employees who chose to disregard the mandate of the proper authority, but what would happen in the case of a hundred thousand miners determined to strike; in the event that the employees of a great railroad system ignored the decision of the licensing authority?

The answer to that is what the answer of society has always been to every objection to a law: a law is valuable or worthless precisely as it is the concrete expression of a moral sense of the community. Any law, no matter how benign and beneficial, will fail of its purpose and fall into disrepute that

voices the sentiments of a faction merely and not the great majority of a community. Any law, no matter how harsh or injurious, will be observed if the majority believe that its observance is for the good of society as a whole. Law never precedes the evil that it is designed to cure, nor is law ever enacted in advance of that evil. First a thing is done, a thing that society regards as injurious. Then society proceeds to correct the evil by its prohibition, the disregard of which meets with punishment. In a word, all law in this enlightened age rests on the consent of the governed.

If the world twenty-five centuries after the writing of the twelve tables, "which next to the Christian religion is the most plentiful source of the rules governing actual conduct throughout Western Europe." in the words of Sir Henry Maine, is content to countenance the same rules of brute force and the same appeal to passion that governed the relations of men before there was even an attempt to form a rudimentary code and recognize the principles of law, nothing more can be said on the subject. The last word has been spoken.

No one need fear that the majority of the male inhabitants of a state will be placed in jail because they have elected to defy the law. No one need fear that additional jails will have to be built in every state. Men will obey the law because it represents public sentiment. A great rhetorician once said that you cannot indict a nation, and because there was a certain ring to the words they have been admiringly repeated by the unthinking, which is what the unthinking always do when words tickle their ears. Truth is, not only that you can indict a nation but more than once in the history of the world nations have been brought to plead at the great bar of public opinion. An entire community cannot be put in jail, nor will anyone attempt it, because there will be no necessity for it. One thing that distinguishes the Anglo-Saxon from any other race is its submission to the law. The law will be respected.

And, finally, we shall be told that the proposed law is unconstitutional, a word to terrify the timorous. Constitutionality, like patriotism, is frequently the refuge of the base and the cowardly. Entrenched behind the bulwark of constitutionality, designing men frighten the pusillanimous by declaring the constitution a thing too sacred to be touched, and by perverting the spirit of the constitution to their own selfish ends. If the suggestion herein made is unconstitutional then nearly every state in the Union has violated the constitution. If a law such as is proposed is unconstitutional, then the law of Massachusetts limiting the hours of labor in cotton mills is unconstitutional; then the law of Congress limiting the hours of labor on government work is unconstitutional, and examples can be multiplied a hundredfold. If it is unconstitutional to regulate conditions of labor, which is for the welfare of society, how much greater must be the unconstitutionality of the law which prohibits a man from working more than a certain number of hours a week, no matter how anxious he may be to exceed that limit. Clearly, in view of a long line of court decisions and the trend of modern society, the plea of unconstitutionality cannot be seriously entertained.

If a constitution stands in the way of progress, the constitution must be modified to suit the new conditions. Society does not exist for the benefit of constitutions. Constitutions are created for the benefit of society. A constitution, like any other law, will endure so long as it proves valuable and performs the functions for which it is provided. When it becomes obsolete or unsatisfactory because society has outgrown it—and society outgrows its laws exactly as a community outgrows its buildings and its transportation facilities—or it can be superseded by something better, that something better, in a progressive society, is found. No society, unless it has reached the limit of its intellectual, physical, material and moral development, is ever satisfied to regard any work of man as a finality. Progress is constant and continued evolution; constant and continued dissatisfaction with existing conditions because of a desire to better them; constant and continued change. Neither constitution, nor law, nor custom, nor convention is sacred. Whenever man makes of his works a fetich; whenever he creates an idol of the child of his brain; whenever out of his own conceit he sets up a graven image and proclaims it as a thing sacrosanct, as a thing consecrated and therefore not to be desecrated by profane hands, he is either uncivilized or only semi-civilized, or else he is lapsing into barbarism.

The advantages in favor of substituting law for brute force in dealing with labor disputes are so obvious that they can be briefly stated.

The main argument, the sole argument, in fact, on which the proposition rests, is that law is to do what violence cannot do, that reason is to take the place of passion, that justice is to rob anarchy of its terrors, that equity is to banish chicanery. The sacred duty of the law, the agent of society and civilization, is to guard the weak from the oppression of the strong, to protect the ignorant from their own nescience. In a labor dispute sometimes it is the men who are weaker, at other times it is the masters. Always the innocent are the greatest sufferers. I can see no reason, either in ethics or expediency, why the simple and exact science of the law should not be applied to provide the remedy. We have tried other remedies and they have all proved failures. Yet the simple remedy of compelling obedience to the mandate of society, the remedy for every other injury to the body politic, has been neglected.

I suppose it will be said that the workingmen have almost universally rejected the principle of "compulsory arbitration" and therefore it is hopeless to try to induce them to accept a much more drastic scheme for the settlement of labor disputes. I protest most strongly against the use of that meaningless phrase, "compulsory arbitration," which is not only meaningless, but an utter perversion of words. There is no such thing as "compulsory" arbitration. Arbitration implies mutuality, an agreement to refer a matter in dispute to the judgment of a third party. When A. and B. differ as to a matter in dispute but are desirious of reaching a settlement and agree to abide by the decision of C., there is no necessity for A. B. and C. calling D. E. and F. to ask G. H. and I. to ascertain the merits of the controversy. When A. and B. are determined to reach an amicable agreement there is no opportunity for the outsider to interfere. No one need "compel" them

to arbitrate. "Compulsory arbitration" is as senseless a phrase as the pseudo medical term "heart failure." Both mean nothing.

But when A. and B. dispute a certain matter and A. finds that B. will concede nothing, that he will not submit the claim to arbitration, and being in possession of the disputed property and physically stronger is able to retain its possession, A. has two remedies. He may, if he is foolish, and undisciplined, and passionate, and revengeful, attempt to take what he considers his own by *force majeure,* or he may, if he is sensible, well balanced and calm, invoke the law and rest assured that justice will be done. If A. should attempt to be his own judge and executioner, if he should destroy B.'s property, and not only the property of B. but that of C. D. and E., innocent persons who have no interest in the quarrel, but who may be caused great inconvenience and suffering by it, the law will quickly punish A., and society will applaud the righteousness of the verdict. Multiply A. and B. a thousandfold, as in the case of a great labor dispute, let A. and B. cause untold misery and suffering not only to themselves but to the community at large, and the law, so prompt and efficacious in revenging the wrongs of society when an individual is the wrongdoer or the sufferer, is veritably stricken with blindness and sits with folded hands impotent, incapable, inefficient. What a travesty on law and all that law means!

MARRIAGE AND DIVORCE PROVISIONS IN THE STATE CONSTITUTIONS OF THE UNITED STATES

By Frederick Charles Hicks, Ph. B., LL. B., Librarian U. S. Naval War College, Newport, R. I.

In connection with the agitation both in church and political circles during recent years, and especially in view of the message recently sent to Congress by President Roosevelt, it is pertinent to inquire to what extent the subjects of marriage and divorce have been dealt with in the state constitutions of the United States.

These being among the subjects concerning which the federal constitution is silent, the power of regulating these institutions lies wholly with the states. It might have been expected that subjects so important would have been treated by the states in their most dignified and lasting enacted laws. This, however, is not the case. Their constitutions touch only lightly on these subjects. Generally, when mentioned at all, the burden of regulating marriage and divorce by general laws is delegated to the legislatures. There is, however, in the constitutions themselves, sufficient to give interest to an examination of these provisions.

Marriage being the institution at the basis of our social existence, and the bond from which release is sought in divorce, it first demands our attention. Out of the forty-five state constitutions, only eleven treat the subject of marriage at all. A group of southern states, including Alabama, Florida, Mississippi, North Carolina, South Carolina and Tennessee has practical

uniformity in a provision prohibiting miscegenation, with special reference to marriage between whites and negroes or persons of negro descent. In Alabama, any degree of negro blood is prohibitive. In Florida, persons of "negro descent to the fourth generation, inclusive," may not marry whites. In Mississippi, the prohibition is for persons having "one-eighth or more of negro blood." In North Carolina, for persons "of negro descent to the third generation, inclusive." South Carolina, like Mississippi, specifies persons having "one-eighth or more negro blood." Tennessee designates "persons of mixed blood, descended from a negro to the third generation, inclusive," and prohibits such persons living with whites as husband or wife without marriage.

The subject of plural marriages receives attention in the constitutions of Idaho, Utah and South Carolina. In Idaho, in addition to a general prohibition of bigamy and polygamy, the ordinary rights of citizenship are denied to those upholding such practices. These provisions constitute the most extensive notice of the subject of marriage in any of the constitutions.

"Art. 1, Sec. 4. . . . Bigamy and polygamy are forever prohibited in the state, and the legislature shall provide by law for the punishment of such crimes."

"Art. 6, Sec. 3. No person is permitted to vote, serve as a juror, or hold any civil office . . . who is a bigamist or polygamist, or is living in what is known as a patriarchal, plural or celestial marriage, or in violation of any law of this state, or of the United States, forbidding any such crime; or who, in any manner, teaches, advises, counsels, aids, or encourages any person to enter into bigamy, polygamy, or such patriarchal, plural, or celestial marriage, or to live in violation of any such law, or to commit any such crime; or who is a member of or contributes to the support, aid, or encouragement of any order, organization, association, corporation or society, which teaches, advises, counsels, encourages or aids any person to enter into bigamy, polygamy, or such patriarchal or plural marriage, or which teaches or advises that the laws of this state prescribing rules of civil conduct, are not the supreme law of the state. . . ."

In South Carolina, "Persons convicted of . . . bigamy" are disqualified from being registered or voting. In Utah, where we might expect the subject to be treated at length, there is only the terse statement, ". . . polygamous or plural marriages are forever prohibited," supported by the provision that "An act to punish polygamy and other kindred offenses," approved February 4, 1892, is to remain in force.

In the constitution of California, it is provided that "No contract of marriage, if otherwise duly made, shall be invalidated for want of conformity to the requirements of any religious sect."

In Massachusetts and New Hampshire, all causes of marriage until such time as the legislature shall have made other provision are to be heard and tried by the "governor and council," and by the "superior court" respectively.

[Sections in state constitutions relating to marriage: Alabama, Art. 4, Sec. 102; California, Art. 20, Sec. 7; Florida, Art. 16, Sec. 24; Idaho, Art. 1, Sec. 4, Art. 6, Sec. 3; Massachusetts, Chap. 3, Art. 5; Mississippi, Art. 14,

Sec. 263; New Hampshire, Art. 75; North Carolina, Art. 14, Sec. 8; South Carolina, Art. 2, Sec. 6, Art. 3, Sec. 33; Tennessee, Art. 11, Sec. 14; Utah, Art. 3, Sec. 1, Art. 24, Sec. 2.]

The subject of divorce has been more generally dealt with than marriage in the constitutions of the states, but with less diversity of treatment. Forty-one of the state constitutions have some mention of divorce. Of these, twenty-five in almost identical terms have the following provision: "The legislature shall not pass local or special laws in any of the following cases; . . . granting divorces . . ." These states are Alabama, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oregon, Pennsylvania, South Dakota, Texas, Utah, West Virginia and Wyoming. A provision similar in effect is found in the constitutions of eleven states, namely, Delaware, Iowa, Kansas, Michigan, Minnesota, New Jersey, New York, Ohio, Tennessee, Washington and Wisconsin. The following are samples of these provisions: "No divorce shall be granted, nor alimony allowed, except by the judgment of a court, as shall be prescribed by general and uniform law" (Del.); "No divorce shall be granted by the General Assembly" (Iowa); "All power to grant divorces is vested in the district courts, subject to regulation by law" (Kans.); "The general assembly shall grant no divorce, nor exercise any judicial power not herein expressly conferred" (Ohio).

In Massachusetts and New Hampshire, it is provided that all causes of divorce and alimony shall be heard and tried by the "governor and council," and by the "superior court," respectively, until such time as the legislature shall make other provision.

Connecticut, Maine, Rhode Island and Vermont do not mention the subject of divorce.

The only instances of originality in the treatment of this subject in state constitutions are to be found in two southern states. Georgia, while not prohibiting divorces, evidently frowns on them. The provisions in her constitution are the following:

"Art. 6, Sec. 15, Pt. 1. No total divorce shall be granted, except on the concurrent verdicts of two juries at different terms of court. Pt. 2. When a divorce is granted, the jury rendering the final verdict shall determine the rights and disabilities of the parties."

"Art. 6, Sec. 16, Pt. 1. Divorce cases shall be brought in the county where the defendant resides, if a resident of this state; if the defendant be not a resident of this state, then in the county in which the plaintiff resides."

South Carolina, however, comes out flat-footed with the prohibition, "Divorces from the bonds of matrimony shall not be allowed in this state."

It should be noted that except in the case of Georgia no distinction is made between divorces *a vinculo* and divorces *a mensa et thoro*. It is plain, however, that the legislatures have no power to grant divorces of either character, except by general law enforceable in the courts. What these legislatures have seen fit to enact on the subject of absolute divorce with right to remarry has been summarized by Bishop William C. Doane in an article in

Public Opinion, March 4, 1905. His statistics include the territories as well as the states. "South Carolina has no divorce law. New York grants a divorce only for adultery. Out of 51 states, adultery is a ground in 50; but, in 24 of these 51, wilful neglect to provide and gross neglect of duty is a cause; in 40, habitual drunkenness; in 43 out of the 51, imprisonment for felony or infamous crime; and in 48 out of the 51, desertion or abandonment."

Since it is now coming to be conceded that a national divorce law, obtainable only through an amendment to the federal constitution, and action by Congress, if not impracticable, is of doubtful desirability, would it not be well to attack this problem through more extensive and uniform provisions in state constitutions concerning marriage and divorce, which shall be obtained through direct appeal to the people of the several states?

[Sections in state constitutions relating to divorce: Alabama, Art. 4, Sec. 104; Arkansas, Art. 5, Sec. 24; California, Art. 4, Sec. 25; Colorado, Art. 5, Sec. 25; Delaware, Art. 2, Sec. 18; Florida, Art. 3, Sec. 20; Georgia, Art. 6, Sec. 15, pts. 1, 2, Art. 6, Sec. 16, pt. 1; Idaho, Art. 3, Sec. 19; Illinois, Art. 4, Sec. 22; Indiana, Art. 4, Sec. 22; Iowa, Art. 3, Sec. 27; Kansas, Art. 2, Sec. 18; Kentucky, Sec. 59; Louisiana, Sec. 48; Maryland, Art. 3, Sec. 33; Massachusetts, Chap. 3, Art. 5; Michigan, Art. 4, Sec. 26; Minnesota, Art. 4, Sec. 28; Mississippi, Art. 4, Sec. 90, Art. 6, Sec. 159; Missouri, Art. 4, Sec. 53; Montana, Art. 5, Sec. 26; Nebraska, Art. 3, Sec. 15; Nevada, Art. 4, Sec. 20; New Hampshire, Art. 75; New Jersey, Art. 4, Sec. 7, No. 1; New York, Art. 1, Sec. 9; North Carolina, Art. 2, Sec. 10; North Dakota, Art. 2, Sec 69; Ohio, Art. 2, Sec. 32; Oregon, Art. 4, Sec. 23; Pennsylvania, Art. 3, Sec. 7; South Carolina, Art. 17, Sec. 3; South Dakota, Art. 3, Sec 23; Tennessee, Art. 11, Sec. 4; Texas, Art. 3, Sec. 56; Utah, Art. 6, Sec. 26; Virginia, Art. 4, Sec. 63; Washington, Art. 2, Sec. 24, Art. 4, Sec. 6; West Virginia, Art. 6, Sec. 39; Wisconsin, Art. 4, Sec. 24; Wyoming, Art. 2, Sec. 27.]

BOOK DEPARTMENT

NOTES.

Andrews, Charles M. *Colonial Self-Government,* 1652-1689. (The American Nation Series, ed. by A. B. Hart, Vol. V.) Pp. xviii, 369. New York: Harper & Bros., 1904.
See "Book Reviews."

A New York Working Girl. *The Long Day.* Pp. 303. Price, $1.20. New York: The Century Company, 1905.
Far more valuable as a real portrayal of actual conditions than most of the attempts of students to live the life of other groups is this simply told story of an anonymous writer. The struggle, the suffering, the hardship, the sham of much pretended charity, the final success ring true. The author entering New York with practically no funds plunges at once into the struggle for a place. Miss Kellor's book, "Out of Work," takes on stronger meaning when this bit of autobiography is read. The author pleads that many existing abuses be corrected; that self-supporting homes for working girls free from taint of almsgiving or sanctified cant be established. She believes that immorality and other vices are more prevalent amongst working girls than many writers would have us believe. Much of this is due in her opinion to the conditions of labor and housing which might be remedied. The book deserves a reading.

Bourne, Edward G. *Spain in America,* 1450-1580. (The American Nation Series, ed. by A. B. Hart, Vol. III.) Pp. xx, 350. New York: Harper & Bros., 1904.
See "Book Reviews."

Cheyney, Edward P. *European Background of American History,* 1300-1600. (The American Nation Series, ed. by A. B. Hart, Vol. I.) Pp. xxv, 343. New York: Harper & Bros., 1904.
See "Book Reviews."

Committee of Fifty, The. *The Liquor Problem.* Pp. ix, 182. Price, $1.00. Boston and New York: Houghton, Mifflin & Co., 1905.
A genuine service has been rendered by the committee by this digest of its studies under the editorship of Professor Francis G. Peabody. Many who are deeply interested in the subject, but without time for the reading of the separate reports, will here find their essence in brief compass and entertaining form. The work of the committee forms the best source of accurate information upon the various phases of the liquor problem, for the studies are rightly named and are not discussions from preconceived standpoints. Mr. John S. Billings writes the summary of the investigations concerning the Physiological Aspects of the Liquor Problem; Mr. Charles W. Eliot regard-

ing Legislative Aspects; Mr. Henry W. Farnam on Economic Aspects; Mr. Jacob L. Greene on Ethical Aspects, and Mr. Raymond Calkins on Substitutes for the Saloon. For the general reader this little book is the most important treatise upon the subject. It should receive wide attention.

Davenport, Frederick Morgan. *Primitive Traits in Religious Revivals.* Pp. xii, 323. Price, $1.50. New York: The Macmillan Company, 1905.

The author, who is a professor of sociology at Hamilton College, fittingly calls his book "a study in mental and social evolution." It is a valuable contribution to our knowledge. Every minister should read it carefully and take its lessons to heart. The social student will find it helpful in explaining phenomena which have not received the attention they deserve.

Beginning with the thesis that revivals are forms of impulsive social action and that the mind of the primitive man is less stable and less controlled by the higher brain centers than civilized man, the author reviews the religion of the Indian and Negro. Then the Scotch-Irish revival in Kentucky in 1800; in Ulster, 1859, and the revivals of Edwards, Wesley, Finney and Moody are carefully outlined. Much that is thoroughly bad in methods and results is revealed and the elements of fear, hypnotic influence, etc., condemned. On the other hand, the author believes in a newer and saner evangelism and in the development of a higher spirituality. "The days of religious effervescence and passional unrestraint are dying. The days of intelligent, undemonstrative and self-sacrificing piety are dawning."

Dunning, William A. *A History of Political Theories from Luther to Montesquieu.* Pp. xii, 459. Price, $2.50. New York: The Macmillan Company, 1905.

Reserved for later notice.

Fagnot, Millerand et Strohl. *La durée légale du travail. Des modifications á apporter à la loi de* 1900. Pp. 300. Price, 2.50 fr. Paris: Félix Alcan.

Farrand, Livingston. *Basis of American History,* 1500-1900. (The American Nation Series, ed. by A. B. Hart, Vol. II.) Pp. xviii, 303. New York: Harper & Bros., 1904.

See "Book Reviews."

Hibbard, Benjamin H. *The History of Agriculture in Dane County, Wisconsin.* (Economics and Political Science Series, No. 2, Vol. I.) Pp. 127. Madison: University of Wisconsin.

Jenks, Albert Ernest. *The Bontoc Igorot.* Pp. 266 and plates. Manila: Bureau of Public Printing, 1905.

This monograph is the first volume of the reports of the ethnological survey of which the author is the chief. The material was gathered during a five months' residence in 1903 in the Bontoc pueblo of north central Luzon. The volume is profusely illustrated. It is a matter of congratulation that the study of the native races of the Philippines is being systematically undertaken. This excellent study reflects great credit upon the author.

Macedo, Pablo. *La Evolución Mercantil, Comunicaciones y Obras Públicas, La Hacienda Pública.* Pp. 617. Mexico: J. Ballescá y Ca., 1905.

In a volume entitled "La Evolución Mercantil, Comunicaciones y Obras Públicas, La Hacienda Pública," Mr. Macedo has published three monographs which constitute an important contribution to the economic history of Mexico. In reading this volume one is impressed with the far-reaching changes that have taken place during the administration of President Diaz. The development of the means of communication, the improvement of the ports and the reorganization of the finances of the country were tasks which might well have appalled a less resolute and patriotic statesman. In this work, especially in the financial reorganization of the country, the author has played an important part. As a member of the Commission on Monetary Reform he exerted considerable influence in laying the basis for the introduction of the gold standard and the establishment of a stable monetary system. It is to be hoped that Mr. Macedo will supplement this series with a monograph on the mining and agricultural development of the country.

Milyoukov, Paul. *Russia and its Crisis.* Pp. xv, 589. Price, $3.00. Chicago: University Press. London: T. Fisher Unwin, 1905.

Reserved for later notice.

Monnier, Auguste. *Les Accidents du Travail dans l'Agriculture et la Législation Anglaise.* Pp. 204. Paris: L. Larose.

New York. *Public Papers of George Clinton, First Governor of New York, 1777-1795; 1801-1804.* Vols. VII and VIII. Published by the State of New York.

Pigafetta, Antonio. *Magellan's Voyage Around the World.* Two Vols. Price, $7.50. Cleveland: The Arthur H. Clark Company, 1905.

Pigafetta's "Account of Magellan's Voyage Around the World" has just come from the press. The original and complete Italian text with page-for-page English translation and annotated by James A. Robertson, with facsimiles of the original plates and maps. Pigafetta is the best and fullest authority for Magellan's voyage which is here completely presented in English for the first time.

Redlich, Josef. *Local Government in England.* Edited by F. W. Hirst. Two Vols. Pp. xxvi, 427, and x, 435. Price, 21s. each. London: The Macmillan Company.

See "Book Reviews."

Reeves, Jessie S. *The Napoleonic Exiles in America.* (Johns Hopkins University Studies in Historical and Political Science, Series XXIII, Nos. 9, 10.)

Reinsch, Paul S. *Colonial Administration.* (Citizen's Library of Economics, Politics and Sociology, edited by R. T. Ely.) Pp. viii, 422. Price, $1.50. New York: The Macmillan Company, 1905.

Reserved for later notice.

Salz, Arthur. *Beiträge zur Geschichte und Kritik der Lohnfondstheorie.* (Münchener Volkswirtschaftliche Studien, No. 70.) Pp. 200. Price, 4.50 M. Stuttgart: J. G. Cotta, 1905.

Sherman, Waldo H. *Civics.* Pp. x, 328. New York: The Macmillan Company, 1905.

A book "for students who have at least reached high school age." The purpose is worthy indeed, and some of the methods of presentation show that the author is concrete and understands how to instruct. But he should not have undertaken to write this book before thinking himself out clearly and fully. It can hardly be a mere mistake in the choice of language which permits him to say (page 76), "The United States, as we have seen, is given power by the Constitution (sic) to regulate commerce," etc. The sins against good English are numerous, and seriously affect the educational purpose of the book.

The volume is divided into two parts, "Studies in American Citizenship" and "Collegeville." In the first, Land and Government, Civil Organizations, Banks, Civic and Municipal Institutions, Justice, etc., are treated. In the second, "Collegeville" represents a township and the various problems of American citizenship are solved in an ideal fashion. The Declaration of Independence and the Constitution are appended.

Sinclair, William A. *The Aftermath of Slavery.* Pp. xiii, 358. Price, $1.50. Boston: Small, Maynard & Co., 1905.

The author, born in slavery, has been the financial secretary of Howard University for the past sixteen years. In this volume he seeks to study "the condition and environment of the American negro." It seems a bit curious then to find the first seven of the ten chapters devoted to a discussion of the legal and political status of the negro, while the last two chapters largely deal with the same topics. But one chapter (No. 7) of thirty-two pages is needed to tell of "The Rise and Achievements of the Colored Race." The author finds in slavery the roots of whatever is bad among negroes to-day. He has nothing but praise for all the reconstruction measures of the Republican party. The South to-day would re-enslave the black if possible. The moral sentiment of the rest of the country together with the power of the negroes will compel a readjustment until the negroes get their rights. There is a fearful condemnation of southern conditions backed up by much evidence which, however, almost totally ignores the thousands of instances of good treatment which must surely offset some of the bad.

The author is critical, not to say vindictive. The style is clean and forceful. Of its kind it is the best any negro has written. The trouble is that the kind is bad. It is the thesis of a special pleader making strong his case by ignoring the other side. It is in no sense a study of the American negro for it makes no contribution to our knowledge, nor does it suggest any new methods of improving conditions. It is worth while to read the book to see what an intelligent negro thinks of the situation, but one closes it with a deep sense of regret that the author sees so little that is good.

Thwaites, Reuben Gold, Ed. *Early Western Journals,* 1748-1765. Price, $4.00. Cleveland: The Arthur H. Clark Company, 1905.

This important volume on early Pennsylvania history has recently been issued. The volume presents the best and rarest contemporary accounts of the most interesting period of early Pennsylvania history, giving the journals of Conrad Weiser and George Croghan, Indian agents from 1748-1765, and of Post, the Moravian missionary. These journals form the very best contemporary material for the history of the last French War and Pontiac's conspiracy.

Tyler, Lyon G. *England in America,* 1580-1652. (The American Nation Series, edited by A. B. Hart. Vol. IV. Pp. xx, 355. New York: Harper & Bros., 1904.

See "Book Reviews."

Whelpley, J. D. *The Problem of the Immigrant.* Pp. viii, 294. Price, $3.00. New York: E. P. Dutton & Co., 1905.

In this study the author presents, after a brief discussion of the general question, "a summary of conditions, laws and regulations concerning the movement of population to and from the British Empire. United States, France, Belgium, Switzerland, Germany, Italy, Austria-Hungary, Spain, Portugal, Netherlands, Denmark, Scandinavia and Prussia." Such data is not easily accessible to the average student or legislator and the volume will be of great service. The information was collected on the ground. The author does not pretend to discuss the many vexing problems. It is to be hoped that he will do this in a later monograph.

Williams, Ralph D. *The Honorable Peter White: A Biographical Sketch of the Lake Superior Iron Country.* Pp. xvi, 205. Cleveland: Penton Publishing Company, 1905.

Willis, Henry P. *Our Philippine Problem.* Pp. xiii, 479. Price, $1.50. New York: Henry Holt & Co., 1905.

See "Book Reviews."

REVIEWS.

Hart, Albert Bushnell (Ed.). *The American Nation.* Five Volumes. First Series. Price, $9.00. New York: Harper & Bros., 1904-05.

Vol. I. *European Background of American History.* E. P. Cheyney. Pp. xxv, 343.

Vol. II. *Basis of American History.* Livingston Farrand. Pp. xviii, 303.

Vol. III. *Spain in America.* Edward Gaylord Bourne. Pp. xx, 350.

Vol. IV. *England in America.* Lyon Gardiner Tyler. Pp. xvii, 355.

Vol. V. *Colonial Self-Government.* Charles McLean Andrews. Pp. xviii, 369.

Among the numerous recent histories of the United States this one, to be completed in twenty-eight volumes, bids fair to surpass not only its immediate associates, but to be considered as the best of all. Every method has its defects. In the present case it is obviously impossible to expect with twenty-six authors the unity of style with its accompanying charms to be found in

Prescott or McMaster. The effort of the editor to keep the volumes uniform in size must also have some bad effects. On the other hand, the reader has the great advantage of getting the ripe judgment of a specialist in each field. Suffice it in general to say that the volumes are clearly written, with rare good taste as to perspective and proportion. They are untechnical, but are provided with ample foot-notes and critical bibliographies. The reader may be sure that all crass errors are eliminated. The attempt is constantly made to portray the life of the people and to explain events in the light of economic opportunity and social conditions so that the political side is not over-emphasized. Judging by the first series, the history will be, when complete, a monumental work fitted to stand comparison with similar productions of the English and German students.

The series begins fittingly with the volume on "The European Background of American History," by Professor E. P. Cheyney, of the University of Pennsylvania. The significance of the disturbance of ancient trade routes by the Turkish invasion is set forth, as is also the story of the great commercial companies. The European governments of the sixteenth century are described and the effect of the Reformation traced. Thus the reader comes to understand the conditions which led to the discovery of America and the migration of the early settlers.

Volume II, "Basis of American History," by Professor Livingston Farrand, is a most important contribution to our literature. It fills a place hitherto almost vacant. For the general reader it furnishes the best account of the life and civilization of the Indians, telling in addition something of the physiography, the flora and fauna of the country. It seems a bit inharmonious to find statistics of recent mineral production and yield of corn, but these were evidently considered necessary in view of the history as a whole. One only wishes that Professor Farrand could have told a little more about the Indians and the degree to which they utilized natural opportunities.

In the third volume, "Spain in America," Professor Edward Gaylord Bourne, of Yale, tells of the great discoverers, Magellan being given highest rank; of the beginnings of the Spanish colonial policy and the race conditions in Spanish-America down to 1821. Professor Bourne gives Spain greater credit than the layman usually thinks her due and shows the existence of a culture in the colonies little mentioned by most writers. Yet, in the foolish restrictions put upon trade and in the lack of initiative and self-government lay the seeds of final decay. Even to-day Latin civilization has a firm hold upon American soil and the author has done well to emphasize the many good things in earlier Spanish customs.

President Tyler, of Williams and Mary College, traces the English settlements, in Volume IV, "England in America." The contrasts between North and South in soil and climate with their results upon social and commercial life are indicated, together with the final conquest of the wilderness and the victory over other nations, tracing the history down to 1652.

The last volume of the "first series" is from the pen of Professor Charles M. Andrews, of Bryn Mawr College, and is entitled "Colonial Self-Govern-

ment." The new colonial system after 1652 is the author's starting point, and the editor claims that some of the vexed problems regarding the charters of Connecticut and Rhode Island have been settled by Professor Andrews' researches. Much new material is presented relative to the other colonies and the beginnings of Pennsylvania. The volume closes with a description of the social and economic conditions about 1689.

CARL KELSEY.

University of Pennsylvania.

Ireland, Alleyne. *The Far Eastern Tropics.* Pp. vii, 339. Price, $2.00. Boston and New York: Houghton, Mifflin & Co., 1905.

Mr. Ireland's book presents a number of strong points; it is based on first-hand knowledge, gathered during a two years' stay in the Far East, it is for the most part clearly written in an interesting style, it gives just the facts which an American might wish to know, and its conclusions are given with an impartiality, honesty and forcefulness which must carry the greatest weight in the minds of the unprejudiced. The work consists of a number of descriptive and critical essays, published at irregular intervals, but all of uniform plan, dealing with the most important British, Dutch, French and American dependencies in the Far East. They have been brought up to date and carefully fitted together so that they constitute a harmonious whole, far superior in value to the author's previous work.

Starting out from the influence of environment upon civilization, the author agrees with Mr. Kidd that the tropical countries are devoid of all ability to produce and maintain an advanced civilization. India, Egypt, Peru and Mexico were at one time highly civilized, owing to the remarkable fertility of their environment, but since this civilization was based purely upon the exceptional fertility of nature rather than the ability of man, it could not endure. The vigor of mind and body which can only come from conflict with nature gives rise to the highest and most permanent forms of progress, which are now realized in what we term western civilization. The peoples of the heated area having come under the tutelage of the northern nations the question arises—how can efficient government and a reasonably advanced state of development be maintained? Shall our chief aim be to develop the native population for complete self-government? The author answers, "if native ideals are to prevail, the substantial control of affairs must remain in the hands of natives, . . . if the administration is to be conducted on western lines the control must rest with white men." The chapters on Hong Kong, British North Borneo, Sarawak, Burma, the Malaccan colonies, Java and French Indo-China all show how Great Britain, Holland and France have maintained a strong control over those dependencies in which the natives outnumber the white population. This control may often be disguised with the object of sparing aboriginal susceptibilities; it may be moderated so as to enlist large numbers of natives in the civil service, but always there exists the undoubted legislative, administrative and judicial control which initiates measures, carries them through the legislative body, executes and interprets them. The Far

Eastern Tropics are governed, and in the main well-governed, by the white man.

Next follow four chapters on American rule in the Philippines, in the course of which Mr. Ireland unsparingly points out the weaknesses of the existing government. The more important of these are, the futile attempt to prepare the natives in a decade for a political system which it took white men centuries to develop; the insistence upon the curious fallacy that education is the first need of the islands, when the great natural resources of the archipelago, whose development is absolutely essential to the maintenance of prosperity, remain practically untouched; the establishment of one of the most costly colonial governments in the whole tropics, which nevertheless returns a minimum of permanent public works to the taxpayer in compensation for exorbitant taxes; the failure to establish peace and order and to protect those natives who are loyal to the government; the maintenance of a prohibitive tariff against Philippine exports to the United States; the failure to give a full and detailed statement of government expenditures, and the absence of any effort to insure an adequate labor supply for the islands.

Two of these points deserve special consideration, viz., the tariff and the labor supply. The governor and commission have repeatedly urged with unanswerable logic the necessity of allowing the Filipino to market his products in the United States, and it is reported that the recent tour of the islands by members of Congress in company with the Secretary of War, has already had a marked effect in showing the need for an immediate change. Hitherto Congress has refused to remove this insurmountable barrier to Philippine progress. In the matter of the labor supply Mr. Ireland shows that throughout the country districts it is practically impossible to obtain either skilled or unskilled labor because of the indolent nature of the inhabitants and the fact that the few who will work, go to the cities. But the author goes much farther; he demonstrates that in almost all the tropical countries of the world where industrial development is taking place, this development rests upon coolie labor from China or East India. It is not to be denied that the disadvantages of the coolie labor system should be weighed in the balance, but neither is it possible to escape the inexorable conclusion that if the native will not work, either the country must be abandoned to industrial stagnation or a supply of willing laborers must be brought in from abroad. The weight of evidence is in favor of the admission of the Chinaman to the Philippines.

James T. Young.

University of Pennsylvania.

Judson, Frederick N. *The Law of Interstate Commerce and its Federal Regulation.* Pp. xix, 509. Price, $5.00. Chicago: T. H. Flood & Co., 1905.

Mr. Judson has written his volume for the purpose of presenting in a "compact form the law of interstate commerce as declared by the courts since the adoption of the Constitution, and also enacted by Congress and

applied by the Interstate Commerce Commission in the direct exercise of the power of federal regulation." "It is the aim of this book to state without needless amplification or iteration the existing law, as its rules have been judicially formulated, and the interesting questions of public policy connected with this subject have therefore not been discussed."

The volume is divided into two parts, the first part, comprising about one-fourth of the book, deals briefly with the power of the federal government over interstate commerce and with the statutes that have been enacted in the exercise of that power. Part two discusses in more detail the interstate commerce act of 1887, the anti-trust law of 1890, the safety appliance legislation of 1893 and 1896, and various other minor acts of legislation regarding interstate commerce. The latter part of the book is devoted to the presentation of information regarding "procedure before the Interstate Commerce Commission." The rules of practice and the forms in proceedings before the commission are given, and a lengthy table is included analyzing the commission's rulings.

The volume is systematically arranged, it is well proportioned and carefully written. It is both a good treatise and a valuable book of reference. Mr. Judson has done an especially useful service by preparing this careful treatise covering not only the constitutional and statute law of interstate commerce, but also the large and highly important body of administrative law that has been developed by the Interstate Commerce Commission since 1887. As he states, "every phase of the complex adjustment of railway rates has been considered by the commission, and their rulings in this infinite variety of cases have a permanent value in the solution of the transportation problems of the future." Neither the lawyer nor the economist interested in transportation can afford to neglect part two of Mr. Judson's book.

Emory R. Johnson.

University of Pennsylvania.

Redlich, Josef. *Local Government in England.* Edited with additions by Francis W. Hirst. Two Vols. Pp. 427, 435. Price, 21s. each. London: The Macmillan Company.

Until very recently, von Gneist's monographs and books upon English local government have been recognized as authorities in all German-speaking countries. In large measure, his theories have had full sway for over a generation, and not until the work by Professor Josef Redlich, of the University of Vienna, was published in 1901, was there a thoroughgoing criticism of them or a comprehensive work upon the subject from the opposite point of view. When this treatise appeared, it attracted attention and received favorable comment not only in Austria and Germany, but in England. Thanks to Mr. Hirst, Barrister of the Inner Temple, the book may now be had in English.

The volumes before us are not a mere translation. Mr. Hirst is a thorough student of his own country, and the two volumes he has written

evidence the scientific character of his workmanship. As Dr. Redlich himself says:

"The reader will see that it is not a mere translation of the German words and phrases, but a real English book. The translator has not only mastered fully the difficulties of the 'learned German,' in which I am afraid the book seems to be written in some parts, and has grasped exhaustively the ideas of the author, but he has also shown himself able in an admirable way to express the opinions of the German author in an original English form of thinking."

A comparison of the German and the English editions shows a number of differences. The English reader is not greatly interested in von Gneist's ideas or their detailed refutation, and Mr. Hirst has very greatly condensed this portion of the original, leaving enough, however, to give the gist of the argument. A similar pruning process has been applied to the portion upon the historical development of political forms and ideas—a subject more or less familiar to Englishmen and upon which there is already a voluminous literature. Indeed, the policy has been followed throughout of condensation or omission of discussions upon such points as are familiar to or easily understood by English readers.

In other instances, Mr. Hirst has expanded and added much new matter, *e. g.*, the chapter upon the territorial basis of the municipal borough, enlarged to four times its original size. These additions will doubtless be more interesting to Englishmen than to Americans, who care little for such anomalous conditions as are described. The new matter in the chapters upon finance, "urban districts," poor law administration and education pleases us more. The last mentioned chapter has been entirely rewritten. In the German edition, the local aspect of the subject was dismissed with a brief notice of three pages; it now covers thirteen. This expansion was rendered necessary partially by the education act of 1902, which was passed after Dr. Redlich had completed his labors. Many interesting points have also been brought out in new foot-notes, and a number which appeared in the earlier edition have been omitted. Mr. Hirst has also added tables of the cases and statutes cited.

A perfectly natural result of the translation and re-writing has been the elimination of errors that inevitably slip in. For example, the minimum of population which a town must have to become a *county* borough is erroneously given by Dr. Redlich to be 100,000; Mr. Hirst has corrected this to 50,000.

In general outlines, however, the two works are entirely similar. The same plan, arrangement and scope have been followed in each. First comes an historical *résumé* of the political development to the end of the eighteenth century. This is followed by chapters on the reform of local government from the development of radicalism to the final establishment of democratic forms and theories in recent years. The constitution and government of municipal boroughs are then dealt with, after which one passes in the second volume to the county councils, urban and rural districts, parishes, poor relief administration and education. Considerable space is devoted to the relation

of the local to the central authorities and the organization and methods of the central departments that deal with local matters. The work closes with an outline of the theory of English local government and a criticism of von Gneist's doctrine of "Self-government."

Professor Redlich, and Mr. Hirst following in his tracks, have devoted themselves to what may be termed the politico-institutional side of local government. Every important local organism has been treated, its origin, development, organization, functions, efficiency and relation to other local bodies and higher governmental authorities. This treatment has by no means been confined to the contents of statutes and judicial decisions, but the factors and motives which dominate this machinery and accelerate or retard its motion are fully considered. Take, for example, the chapter on "Municipal Electioneering and Municipal Politics." I know of nothing else ever published which gives such an accurate and satisfying account of campaign methods in municipal elections, the attitude of the national parties in local politics, the working of the party system and the post-election attitude of successful candidates. No subject has been more frequently misunderstood and misrepresented in American books and articles.

The restriction of the field to the anatomy of local government has excluded obviously a long list of subjects which are extremely interesting, such as the social problems of city life and the relation of the community in its governmental capacity to economic and social conditions. But this fact is stated not as a criticism, for the boundaries set have logically been defined, but to give an idea of the scope of the work. To have handled these other subjects of such vital interest with the same degree of thoroughness would have required at least one additional volume. This work has been left to other hands.

The American reader who uses German and English with equal fluency will generally find the English edition more satisfactory: the view-point is more nearly our own. In certain specific instances, however, it will be necessary to consult the German edition rather than the English, as the two are not exactly alike. No one who wishes to be informed accurately upon the subject, especially that phase which is so prominent now—municipal government—can afford to be without either the German or the English edition. It is by far the best book upon its subject that has appeared in any language, and will receive a hearty welcome in the United States.

Milo R. Maltbie.

New York City.

Ross, Edward Alsworth. *Foundations of Sociology.* Pp. xiv, 410. Price, $1.25. New York: The Macmillan Company, 1905.

In this volume Professor Ross has gathered articles which have already appeared in various magazines; the earliest, the chapter on "Mob Mind" from the *Popular Science Monthly* of July, 1897; the latest, "The Value Rank of the American People," from *The Independent,* of November 10, 1904. The

volume is marked by the author's well-known versatility, clearness of statement and brilliancy of generalization. The chapters, however, show that they were written for different occasions. It is more than doubtful, too, whether some of them would have been included had the author started *de novo* to write the book.

In the preface it is stated: "An authoritative body of social theory exists at present as aspiration rather than fact. In this volume the writer has ventured on little beyond the laying of foundations." In the mind of the reviewer it is a bit premature to lay the foundation until the stones are quarried. For this reason I dislike the title of the book and believe that the author could have found one far better fitting the text.

Professor Ross looks upon sociology as a general science, of which social morphology, psychology, mechanics are but segments. Those phenomena are social "which we cannot explain without bringing in the action of one human being on another." In the first chapter, "The Scope and Task of Sociology," the author is running the boundary lines of the science, while in the second, economics and sociology are distinguished. In the chapter on "Social Laws" some of the pet formulæ of various writers are discussed with the conclusion that "sociology is not so much a sister science to politics or jurisprudence, as a fundamental and comprehensive discipline uniting at the base all the social sciences." The discussion of "The Unit of Investigation in Sociology" is very suggestive and stimulating. "The bane of sociology has been the employment of large units, the comparison in lump instead of the comparison in detail." "It is better to look for the common features of crowds or clans, or secret societies, or mining camps, or towns, than to compare nations." The real unit is the "social process," not some "product," be the product "groups," "relations," "institutions," "imperatives," "uniformities." "The social forces are human desires," which the author divides into "natural" (appetitive, hedonic, egotic, affective, recreative) and "cultural" (religious, ethical, æsthetic, intellectual). "The corner-stone of sociology must be a sound doctrine of the social forces."

Seventy-three pages are devoted to "The Factors of Social Change." The line of cleavage between statics and dynamics lies in the distinction between *persistence* and *change*. It is time sociologists dropped the words progress and regress and discussed *social change*. The growth of population, wealth, migration, invention and environmental changes are the chief stimuli to social change. This chapter is very valuable. The author has also rendered a service in his section of ninety-six pages on "Recent Tendencies in Sociology" in which the ideas of recent writers are compared and criticised. Chapter ten, "The Causes of Race Superiority" was the annual address before the American Academy of Political and Social Science in 1901, and was printed in the ANNALS, of July, 1901. The last article on "The Value Rank of the American People" is a brief essay to show that, unless care be taken, continued immigration, the absence of free land, the destructiveness of city life may seriously threaten the so-called "American spirit."

In brief, these are the topics treated. No one interested in the development of social theory, or in the understanding of social phenomena can

afford to leave it unread. The volume belongs in "The Citizen's Library," edited by Professor R. T. Ely.

Carl Kelsey.

University of Pennsylvania.

Willis, Henry Parker. *Our Philippine Problem.* Pp. xiii, 479. Price, $1.50. New York: Henry Holt & Co., 1905.

It needs to be stated at the beginning that this book is frankly critical of our Philippine policy, and particularly of the administration thereof. One who holds the views that the author evidently entertains in regard to "imperialism" could hardly write otherwise. Admitting that the political ethics of imperialism is an open question we can only ask our author to avoid censoriousness. Opinion will surely be divided as to whether he has succeeded in this or not, but since the division will probably traverse political lines of cleavage, we may accept it as considerably more than a brief of the attorney for the prosecution. So much can be stated at the beginning. Further perusal and analysis of the book will convince many readers, perhaps unwillingly too, that the criticisms and charges it contains are not only serious and grave in the extreme, but that their authenticity seems unquestionable. Let us particularize.

"It is obvious," he says, "that an absolute government, such as exists to-day in the Philippines, cannot lay claim to merit as the representative of popular will, and must rest for its justification (so far as any is possible) upon results. It must stand as a despotism, and those who believe in despotism anywhere applied can warrant such belief only on the ground that it is benevolent." The assertion that it is an absolute government, a despotism, he supports by the following evidence:

"The powers now actually in the hands of the civil governor are—1. All executive authority; 2. Leadership of the 'legislative' body and power to prescribe its rules and mode of operation, including the practical power to initiate all legislation; 3. Appointment of all officers of the government outside of the civil service, including judges of the first instance; 4. Practical direction of the military forces in their operation and distribution."

The so-called "legislative body" or commission acts as no check to the executive, as it is completely subservient thereto. "It should be understood that the islands are not now under civil, but under military, rule," the ruler being required to report regularly to the Secretary of War, and in no other way is information obtainable. This is certainly a condition of despotism; is it justified by the results?

Professor Willis answers, no; but he is careful to state that the present officials are not to be held responsible for a situation necessarily resulting from our military occupation of the islands. Among the evidences that our despotism is not benevolent in its results we may take time to notice the following:

First, the legal and judicial system rests upon three main supports: (*a*) Spanish law; (*b*) American procedure; (*c*) legislation by the commission.

We have an English-speaking governing class struggling with a legal system predominantly Spanish, in an attempt to administer justice to a population speaking a score of dialects. Native judges must necessarily be retained in courts of the first instance. This involves the elimination of trial by jury. Moreover, limitations have been thrown about the writ of *habeas corpus.* As a result, "it is a fact that there are now men confined in prisons throughout the archipelago, arrested without warrant and entirely ignorant why they have been detained." "Under Spanish law, officers who detained men in prison more than twenty-four hours without presenting them before a suitable judicial officer and showing cause for their arrest were *ipso facto* guilty of the severely penalized crime of illegal detention."

The second point in the indictment of the legal and judicial system is the servility of the judiciary to the commission. "The truth is," he says, "that in all criminal cases the judiciary has cooperated so closely with the commission as to be practically nothing more than a mere tool in the hands of that body." Appointed as they are, "it would require unusual strength of character for judges to resist the pressure to which they are likely to be subjected. They cannot help recognizing the circumstances under which they were selected, the fact that they receive larger salaries than they could probably get elsewhere, and that certain things are expected of them." "A judiciary, pliant, serviceable, bowing the knee to the executive, has been built up."

Second, the control of public opinion in the Philippines is something to which Americans are not accustomed at home. "It seems that the organs of control are so effective and the forces making for subordination and silence so strong, that they are irresistible." The sources of official information are closed to the public, the aid of the sedition act is invoked to suppress freedom of speech, teachers are cautioned "to exercise such care as the situation demands," "the pulpit and the stage have been subjected either to unofficial or official surveillance," and finally, notwithstanding official assurances that "there is in the islands to-day freedom of speech, of the press, of assemblage and of petition," specific evidence to the contrary is furnished.

This in itself is not so iniquitous as it might seem, unless it has the result of creating distrust and disaffection among the natives. Unhappily, more or less caution, secrecy, surveillance and general inhibition of news relating to the public must be characteristic of the government of a dependency, and the question is not so much in any case whether it exists, as whether it is excessive. Professor Willis leaves no doubt that it does exist. Moreover, the evidence he gives as to its being excessive is sufficient to silence criticism from disinterested sources not on the ground. One could only say that it is possible he does not take into full account the natural difficulties of the situation.

Many other topics are taken up and treated with considerable detail, such as local government, the constabulary, political parties, the church problem, American education in the Philippines, social conditions, economic legislation, exploitation of the Philippines, rural and agricultural conditions, etc. In style it is unusually readable and entertaining.

It is a book which invites investigation, and no doubt it will get it; that too, probably, in no gentle mood at times. Nevertheless, allowing for legitimate differences of opinion upon the fundamental subject of imperialism, the principal questions it raises all the way through are merely questions of *degree*. Hence the effect should be simply that of sane, healthful criticism, whatever asperities it may raise at first. When an author states himself so frankly he should arouse no resentment from those who are equally above board in their own conduct, even if his strictures are severe.

J. E. Conner.

Washington, D. C.

Parks and Public Playgrounds

THE RECORD OF A YEAR'S ADVANCE

A SYMPOSIUM

CHICAGO

By Hugo S. Grosser, Esq., City Statistician, Chicago, Ill.

Although the park system of Chicago is almost as old as the city itself, its growth has in no way kept pace with the growth of the city, and to-day the great city of Chicago, with its area of 190 square miles, has a total park area of only 2,463 acres, a smaller area per capita of the population than that of any other of the larger cities in this country.

Chicago's first park was established in 1839, two years after the incorporation of the city, and consisted of one-half a square on the lake front, extending to Michigan avenue. During the next thirty years additions were made to the park system by the gift of small areas throughout the city, and there were ultimately some forty-four public and private parks in existence when the first systematic plan was inaugurated for the establishment of Chicago's park system. Chicago's parks are not under the jurisdiction of the city government, but are governed by three different park boards, created through acts of the state legislature from 1869 to 1871. The Lincoln Park Commissioners are in charge of Lincoln Park—which had been established by the abolition of a cemetery as early as 1860, while the rest of that park was made from sand wastes and swamps—and the boulevard system and smaller parks on the north side of the city; the West Chicago Park Commissioners rule over the parks on the west side, namely, Douglas, Humboldt and Garfield Parks, while the South Park Commissioners are in charge of the park area on the south side of the city, the largest parks of which are Washington and Jackson Parks. The first two commissions are appointed by the governor of the state, while the South Park Commissioners are elected by the judges of Cook County. These park boards are absolutely independent of any other governing body, and levy their own taxes. For many years it has been sought to do away with this multiplicity of taxing bodies, and in a constitutional amendment adopted by the people in 1904 provision was made for a consolidation, but as yet the state legislature has not passed any law to carry into effect this provision.

Besides the parks controlled by these three park boards, the city of Chicago, through its Department of Public Works, has jurisdiction over some thirty-six small park spaces and triangular plots at street intersections. Some

of these have been transferred to the control of the park boards. The expense for the maintenance and improvement of the so-called "city" parks is met by annual appropriation of the city council. The boulevard system in connection with the chain of parks, which is being extended from year to year, is also in charge of the various park boards, the original cost of construction being defrayed by special assessment on the abutting property, while the cost of their maintenance comes out of the general park and boulevard taxes.

A few years ago Chicago experienced an awakening to its park deficiencies, due to the efforts of the Special Park Commission to obtain small parks and playgrounds in the congested districts of the city. This commission is appointed by the mayor, and consists of nine aldermen and six citizens. By means of a series of bills passed by the General Assembly in 1901, 1903 and 1905, the three park boards mentioned have received authority to issue $11,000,000 in bonds for various park and playground extension plans. This vast sum is divided among the park boards as follows: Half a million dollars for small parks and playgrounds in the densely populated portions of the north side; one million dollars for the extension of Lincoln Park by reclaiming 215 acres of submerged land along the lake shore; one million dollars for small parks and playgrounds on the west side; two million dollars for the general improvement of the large parks on the west side, which have been allowed to fall into a state of decay through the ruling hand of the politicians, mismanagement and extravagance in keeping a useless pay roll; one million dollars for small parks and playgrounds, not exceeding ten acres, on the south side; three million dollars for the completion of Grant Park on the lake front and the creation of larger parks than ten acres on the south side; two million five hundred dollars for the completion and improvement of, and additions to the larger park system on the south side. Since 1901 fifteen new parks have been acquired, ranging in area from six and a half to three hundred and twenty-two acres, and aggregating seven hundred acres, not included in the area quoted above. These are scattered over the great south side from Twenty-fifth to One Hundred and Thirteenth street, and from Central Park avenue to Lake Michigan. The land has cost one million eight hundred thousand dollars, and the improvements thus far two million five hundred and seventy-five dollars.

The Lincoln Park extension work is in progress, but no start has been made to acquire the small parks on account of indifference on the part of the park board, masked behind legal technicalities. The West Park Board pursued a masterly policy of inaction as to small parks for several years, and when defects were discovered in their act, a new one was passed last winter. With a reconstructed board of business men, a fresh start will be made this winter to get the much needed small parks, after a vote is taken on the bond issue at the November election.

The most interesting side of this park extension on the south side is its social and educational aspect. Each new park has, or will have when finished, as its central feature, a field house or neighborhood center, comprising in each case a well equipped gymnasium for men and boys, another for women and girls, shower and plunge baths for each sex, a reading room, a lunch counter,

two or three small club rooms, and a large assembly hall. Adjacent to each central building are a band stand, with surrounding seats, broad concrete walks, and spaces for roller skating, out-door gymnasiums for men, women and children, all in separate sections, a large swimming pool with showers and dressing-rooms. The public library board has arranged to establish branch libraries in several of these buildings. Each park is also equipped with athletic fields for ball games, a skating area and place for toboggan slides.

These are not the only plans for extending the park system of Chicago, and a far more ambitious scheme is being agitated at present. Last December the Special Park Commission issued an elaborate, illustrated report, suggesting a scheme for a metropolitan, or outer belt park system in city and county, following the scheme of the Boston Metropolitan Park Commission. It is proposed to acquire a chain of city and country park areas, mostly natural wooded lands and banks of rivers and lakes, aggregating 37,000 acres. A bill providing for the organization of a forest preserve district was passed by the last legislature, and the question will be voted upon at the November election. The proposed district comprises nearly all of Cook County. The commission is to be appointed by the governor, and will have authority to issue bonds to the extent of four million three hundred and sixty thousand dollars without a referendum, and thirteen million dollars after getting a referendum vote of the people. The commission will also be authorized to raise about four hundred and twenty-five thousand dollars a year for maintenance.

There are now nine municipal playgrounds—three on each side of the city—in thickly populated districts, which are all in charge of the Special Park Commission. The funds for these playgrounds are obtained from the city council's annual appropriation, or by private contributions of land, money and equipment. In some cases the land had been previously owned by the city, in others the free use had been given for a fixed period, or until the site is sold, so that there is no security of tenure except in three playgrounds. Miscellaneous apparatus is provided for children of all ages, open fields for baseball, football, basket ball, running and jumping; besides cinder tracks, shower bath house and skating ponds, provided at each ground where the area is sufficient. Lack of funds has prevented the city from equipping its playgrounds in the elaborate manner described as to the south side small parks, yet more than one million children and young men and women visited the playgrounds last year. The Merchants' Club has provided a fund each year with which prizes are purchased and awarded to young athletes in competitive sports, and to younger children excelling in raffia weaving and other handiwork during the summer vacation. The city maintains a general director of athletics and gymnastics, who also acts as superintendent, besides a director at each ground, women kindergartners for the children during the summer vacation. Track teams, teams for baseball, football and basket ball are organized among the boys at the various grounds, and high-class games are played with outside teams. The commission provides free uniforms for the baseball and football teams.

Several sites have been secured on the west and north sides of the city for playgrounds, but are waiting for equipment funds. The commission has

just issued an appeal to the public, asking for donations of money and land and setting forth the need for more playgrounds, especially on the west side.

In addition to the municipal playgrounds, there are half a dozen playgrounds conducted as philanthropic enterprises by social settlements and other organizations. The Roman Catholic Church people have also established several playgrounds in connection with their parochial schools.

The question of public baths has, during the last few years, received considerable attention on the part of the city authorities. At present the city has under contract for completion within a few months, or in operation, twelve municipal bath houses, scattered throughout the city in the poorer districts. They are under the control of the Department of Health, as are also three bathing beaches along the lake shore. These municipal bath houses, seven of which were in operation in 1904, were in that year attended by 650,000 persons, and the Department of Health expended for their maintenance and operation the sum of $23,519.24. A bathing beach is also maintained at Lincoln Park.

BUFFALO

By Prof. A. C. Richardson, Buffalo, N. Y.

Buffalo established its first municipal playground in the summer of 1901, using for that purpose a part of the park system known as The Terrace, which is situated in the midst of a densely populated district downtown. This playground is under the charge of the Park Commissioners, while the others are managed by the Department of Public Works. Three additional playgrounds were established in 1902 and two more in 1903, so that there are now six. Their areas are as follows:

Terrace Park	57,600	sq. ft.
Johnson Street	73.392	"
Broadway Market	72,820	"
Hamburg Canal	106,730	"
Bird Avenue	45,011	"
Sidway Street	46,900	"
Total	402,453	"

All these grounds are on city property except that on Sidway street, for which, only a nominal rent is paid, consisting of the current taxes on it. The Bird avenue ground has the great advantage of being located next to a public school, which of course is the ideal location, as the basement of the school furnishes room for the storage of apparatus and for shower baths, which are an indispensable adjunct. Shelter houses have been erected for these purposes on all the other grounds.

The annual appropriation for the maintenance of these grounds is between

$11,000 and $12,000, which includes the salaries of two directors for each ground. These twelve directors compose the Playground Association, and meet weekly to file reports of the attendance and games played, and to regulate in general the policy of the playgrounds. There should be, and probably at some time will be, a general director to supervise all the grounds and see that the various employees do their work properly. The grounds are open from about the first of June to some time in November, and the average monthly attendance in 1903-04 was 130,770. For three years past an annual inter-playground meet, known as the Buffalo Civic Games has been held, at which gold, silver and bronze medals were awarded to the successful competitors; but this year each playground had its own separate meet instead.

The equipment of the Bird Avenue ground, which is typical of them all and will serve to indicate the nature of the games played, is as follows: Cinder track, horizontal bars, trapeze, swings (16), testers, jumping ground, basket-ball courts (2), hand-ball court, sand boxes, babies' swings and Maypoles.

The following extract from a report made to the Charity Organization Society by its Committee on Municipal Playgrounds in 1903, will serve to indicate the nature of the effect produced upon the immediate neighborhood by the opening of a playground. The conversations quoted are vouched for as actual occurrences:

"The improvement in playground districts has been marked. The immediate neighbors, usually at first hostile, soon became warm friends of the playground. A sense of community of interest grows up. On returning a stolen bat a small boy replied to the director's questioning, "Well, you see, Mister, I thought I was stealing it from you, but when I thought it over I knowed it belonged to all the boys as well as me; dat's why I brought it back." Crap-shooting, never permitted on the playgrounds, has nearly disappeared from their vicinity. Large numbers of boys have been induced by the directors to quit cigarette smoking, as not conducive to athletic attainments. Two years ago a prominent west-side woman, who owned some houses on the east side, found on inspecting her property, that the windows were not broken as they had been other years. She made inquiry as to the reason for the change, and learned that a playground had shortly before been established in the neighborhood. Since then she has made strong pleas for playgrounds before the aldermen. A boy on the playground pointing to a portly policeman, said, "Dere goes old Battles, de cop. He won't arrest us any more now, as youse's got a playground for us kids. De playground is good for him as well as us." "How's that," asked the director. "Why can't ye see, old Battles used to be thin as er match when he chased us kids, but now he's big as er barrel 'cause he ain't got no work to do."

Public Baths.

The following extracts from official reports of the Health Department furnish a complete history of the municipal baths of Buffalo. (Monthly Report, April, 1900):

"In the winter of 1894-95, a sub-committee of the Buffalo Charity Organization Society, which, through personal investigation of the tenement house districts, became familiar with the fundamental principles which underlie the need of poor families that lack home conveniences, and of the working classes that require bathing facilities as a common decency of life, took under consideration the question of establishing a free municipal bath house. This committee was composed of Dr. John H. Pryor, William A. Douglas, and Williams Lansing, assisted by the Health Commissioner. Its members, on more than one occasion, aided and sustained those entrusted with the administration of the laws affecting public health, and through the united efforts of this committee and the Department of Health, the proposition was brought before the Common Council, and advanced to a stage where the establishment of a free public bath by the municipality was an assured fact, and just as the provisions became favorable, and the necessary point attained, the State Legislature enacted the subjoined measure entitled 'An Act to Establish Free Public Baths in Cities, Villages and Towns.'"

Chapter 351—Laws of New York State, 1895. Section 1.—"All cities of the first and second class shall establish and maintain such number of public baths as the local board of health may determine to be necessary; each bath shall be kept open not less than fourteen hours for each day, and both hot and cold water shall be provided. The erection and maintenance of river or ocean baths shall not be deemed a compliance with the requirements of this section. Any city, village or town having less than 50,000 inhabitants may establish and maintain free public baths, and any city, village or town may loan its credit or may appropriate of its funds for the purpose of establishing such free public baths."

"The constitution of the State of New York recognizes cities of the first class as having a population of 250,000 or over; cities of the second class 50,000 or more, but less than 250,000; and cities of the third class less than 50,000. Money was now appropriated, plans were ordered, site selected, contracts let, and ordinances providing for attendants and mangement passed, so that by January 1, 1897, the first absolutely free municipal bath house in the world was established, completed in every detail and put into full and successful operation. It is officially known as Public Bath House No. 1. It is not only free, but open on every day in the year from 7 a. m. to 9 p. m., excepting on Sundays and holidays, when those requiring a bath must observe the hours from 7 to 10 a. m. There is absolutely no charge for its use, no restrictive classification of users, soap and towels are gratuitous, with an unlimited supply of water, both hot and cold, the only restriction imposed being, necessarily, one of time, namely, that bathers cannot occupy an apartment longer than twenty minutes. Additionally, facilities are afforded to wash and dry underclothing, so that the equipment of the establishment sends forth those which patronize it cleansed both in person and clothing. This is at variance with the customs that prevail at the European municipal bath houses where, in every instance, for equal bathing facilities, a fee is demanded.

"This bath is located in Police Precinct No. 1, which has an area of only

0.86 square miles or about 2 per cent. of the entire area of Buffalo, yet, according to the police census of 1895, it has a population of 20,587 or six per cent. of the entire population, and this, notwithstanding the fact that a very large portion of the precinct is taken up by railroad tracks, the Terrace, canal docks, depots, public buildings, stores and manufacturing establishments.

TABLE OF BATHS GIVEN.

YEAR.	1897.	1898.	1899.	1900.	1901.	1902.	1903.	1904.
Bath House No. 1 .. Opened Jan. 1, 1897.	76,873	79,381	81,793	86 795	89,112	77,675	78,343	77,051
Bath House No. 2 .. Opened Jan. 2, 1901.	.....	.....	.....	.....	145,143	115,975	108,281	117,523

COST AND MAINTENANCE—PUBLIC BATH HOUSES NOS. 1 AND 2.

	No. 1.	No. 2.
Cost of land	$6,500.00	$2,600.00
Cost of building	8,000.00	15,000.19
Cost of equipment	300.00	563.40
	$14,800.00	$18,163.59
Salary of keeper	$500.00	$500.00
Salary of matron	400.00	400.00
Salary of assistant keeper	480.00	480.00
Salary of firemen, two, each $600	.....	1,200.00
Coal and wood	[1]1,100.00	2,050.03
Furnishing and laundrying towels	380.79	567.52
Soap	233.22	275.52
Incidentals	21.22	119.31
	$3,115.23	$5,592.38
Credit by waste soap returned	33.06	32.58
	$3,082.17	$5,559.80

The popularity of these aids to sanitation is very evident from the tables of baths given. In fact, so popular are they, that they are inadequate to fill the demands made upon them, and provision should be made, in the very near future, for at least one additonal bath house."

The facilites for *out-door* bathing in summer in Buffalo are not good. Owing to shortsightedness in the past the lake shore is now accessible in but

[1] Estimated steam furnished No. 1 by Municipal Building.

very few spots, and these can be reached only after crossing railroad tracks. At two of them, however, the city maintains cheap wooden dressing-rooms under the charge of a caretaker, who rents soap, towels and bathing trunks for a small fee. The contemplated changes in the water supply system, however, include plans for an outdoor swimming pool similar to that now in use at Erie, Pa. But it is probable that this will not be constructed for several years.

WASHINGTON, D. C.

By George S. Wilson, Esq., Secretary Board of Charities of the District of Columbia.

There is no material change in the park system proper in the District of Columbia since my notes of last year. Considerable progress has been made, however, in the effort to develop public playgrounds in the small parks and in the yards of the public school buildings. For three years the effort to conduct public playgrounds was carried on by a volunteer committee without aid from the public treasury. Last year official endorsement was given to the movement to the extent of an appropriation of $3,500—$1,500 for the equipment of public playgrounds in school yards and $2,000 for playgrounds not connected with public schools. The major portion of the burden, however, was still borne by private contributions.

The playground movement was first started in Washington in the summer of 1903, and during that summer six playgrounds were maintained; in 1904 eleven were in operation, and in 1905 nineteen were maintained. Of the nineteen maintained during the past year eleven were in public school yards and eight on public reservations and vacant lots. A trained supervisor, Dr. Henry S. Curtis, of New York City, was employed for six months to direct the work. His time was occupied largely in selecting and training kindergartners and athletic directors, whom the committee found it necessary to provide for the proper supervision of the work. The committee seems now to be convinced that public playgrounds cannot be made successful without competent directors. They look upon a playground without a director as being almost as bad as a school without a teacher.

Much greater interest was shown in the movement during the past summer than during the preceding years. Athletic contests were held throughout the summer at the various grounds and between representatives from the different grounds, and at the end of the season, on September 8 and 9, field days were held. The successful contestants in these final events received medals,—gold medals for first prizes, silver medals for second, and bronze medals for third. A banner was given to each winning team, and a special prize banner, the gift of one of the local newspapers, was presented to the team winning the largest total number of points. Separate playgrounds were conducted for white and for colored children, and separate field days were held. The local committee now feels that the importance of the playground movement has been sufficiently demonstrated to warrant generous appro-

priation of public funds for its maintenance, and an effort will be made this winter to secure from Congress a larger appropriation for the maintenance of the work. An effort will also be made to secure funds to purchase and equip one small park playground. It is the policy of the committee to urge upon the city the acquisition of small parks to be used as playgrounds in the various crowded sections, and they are urging an appropriation this winter for the first of such playgrounds, which they hope to make a model and use as an argument for the acquirement of others.

SEATTLE

By Prof. J. Allen Smith, University of Washington, Seattle.

The first step looking toward the acquisition of land for park purposes was taken by the municipal authorities of Seattle in 1884. Little was done, however, during the following decade, and not until about 1897 did the need for public parks begin to receive serious consideration. Since this date the city has purchased three tracts of land—Woodland Park, containing 196 acres; Washington Park, with an area of 128 acres, and City Park, of 125 acres. Woodland Park, situated in the northern part of the city, is a beautiful piece of property, having a frontage of over half a mile on Green Lake. Washington Park, which is situated in the east central part of the city, extends for more than a mile along the shore of Lake Washington. City Park is just outside of the city limits, and is at present unimproved. The municipal authorities have also acquired through gift or purchase several smaller pieces of property in various parts of the city.

A plan for the improvement and extension of the present park system, prepared by a well-known landscape architect of Massachusetts, is now being carried out under the direction of the municipal board of park commissioners. The plan adopted contemplates the preservation of some remnants of the original forest which fortunately have not been destroyed. It will also utilize the unusual advantages which Seattle possesses in the abundance, variety and magnificence of its views of lake, sound and snow-capped mountains.

The campus of the University of Washington should also be mentioned in connection with the Seattle park system. It contains 355 acres, a large portion of which is in the original forest state. It lies between Lake Washington and Lake Union, having a water frontage of more than a mile on the former and about a quarter of a mile on the latter. It is within the city limits, and, though belonging to the state, is virtually a part of the municipal park system.

During the last two or three years there has been a marked growth of sentiment in favor of providing suitable means of recreation for the pupils of the public schools. Several of the schools now have teeters, swings, horizontal bars, basket ball and tennis courts, etc. The scheme of recreation and amusement also includes a garden on or near the school grounds, which is cared for by the children.

DULUTH

By W. G. Joerns, Esq., Duluth, Minn.

In the earlier days Duluth was provided with only such public parks as had been reserved and dedicated to public use in the several plats of the city's subdivisions. These were mostly in the nature of public squares, except a few larger dedications in suburban plats, and had remained almost wholly unimproved. It was in the latter eighties that a broader scope and systematic development of Duluth's park system was agitated and inaugurated. The prime figure in this movement was Mr. W. K. Rogers, who was better known to the general public as the one-time private secretary of President Hayes. Mr. Rogers had come to Duluth and took a deep interest in its development. He recognized its wonderful natural beauties and the unusual possibilities for the development of a substantial and beautiful park system. He was the leader and the hardest worker in the movement for the creation of this park system, and to his enthusiasm and great effort was largely due the fact that the system, as it exists to-day, was finally established. Mr. Rogers became the first president of the first park board of Duluth.

Six hundred feet above the level of Lake Superior, along the brow of the hills surrounding Duluth, the remains of an ancient beach form a natural roadway which connects numerous small water courses and deep gorges and ravines, and all, extending over a distance of some seven miles or more, have been acquired by the city and are now a part of the park system of Duluth, and form one of the most beautiful natural drives in the world. The city expended in the purchase and improvement of this particular part of its park system approximately three hundred thousand dollars, and this sum forms a part of its present bonded indebtedness.

The control of the parks and parkways of the city is vested in a Board of Park Commissioners of five members, who are appointed by the Mayor, subject to confirmation by the District Court. The president of the park board is ex-officio a member of the City Conference Committee. The members serve without pay. The park fund is provided by annual tax levy and has been running at about $10,000 a year. An increase of approximately $5,000 was made for the coming year to provide means for the acquirement of additional park property.

The public parks of Duluth are well distributed throughout the different sections of the city, are well taken care of and are extensively used by the public. In the improvement of the same the aim has been observed to retain, as much as possible, the natural scenic beauties. Some of the smaller squares have been made into beautiful flower gardens. The park board has also taken charge of the planting of trees in public streets, under direction of the Common Council, and in the course of the past ten years the general beauty of the city has been thereby much improved. Some of the public squares have been devoted to recreation purposes as playgrounds, and in winter as skating rinks; but Duluth has as yet neither public baths nor gymnasia.

II. DEPARTMENT OF PHILANTHROPY, CHARITIES AND SOCIAL PROBLEMS

The New York Society for the Prevention of Cruelty to Children was organized in 1874, and at once found itself *alone* in a field of immense opportunity. It became necessary for it to frame laws to cover existing conditions and with a view to the future; to get the good will and approval of legislators and of public authorities, a matter not always easily brought about, as those connected with struggling institutions doing a public work well know; and to assert itself in a manner intended to bring about not only confidence in it, but encouragement in the organization of similar institutions elsewhere. These things it did, with the result that opinions and decisions of the highest courts to-day lend sanction and approval to its efforts on behalf of suffering childhood. The trials through which it passed in its early years, hard to bear as they were, only tended to fit it for the greater work yet to come, and of which not the least indication was then to be had.

There are to-day, in the United States alone, nearly four hundred societies linked together for the prevention of cruelty to children, every one of them organized since the work was begun in New York and all working under laws based upon those of this state. Every important city in Europe has its society and India and Australia are not without representation.

It was the privilege of the New York Society to be sponsor to the first laws of the empire state regulating the hours of child labor; and, that "child labor" represents but 2 per cent. of the working population of the Metropolis is perhaps due more to that early foresight than to any other one thing. It also drafted the legislative enactments separating children under sixteen years of age from adults charged with crime.

The parole or probation system now so generally in vogue had its birth in the old method of suspending sentence upon a child convicted of crime and placing him in the legal custody of a clergyman, a school teacher or other responsible citizen, during good behavior. In a single year hundreds of children were so released, and many of them upon my personal application. The number returned to court for violating the provisions of the terms of their release was proportionate with the number of returns for what is now called "violation of parole." The present method, however, is systematized to an extent that makes it one of the most important branches of the society's work. The writer is the chief probation officer for the boroughs of Manhattan and The Bronx and, as such, has personal direction of the probation work authorized by the justices of the criminal courts within that jurisdiction. The average number of boys and girls on probation is two hundred. These are regularly visited by trained special officers, deputized to act as probation officers, who acquaint themselves with the child, its characteristics, surroundings and

general conditions. The findings in all cases are presented in detail to the courts, with such recommendations or suggestions as each requires.

The recent, though quite natural, spread of probation all over the country and to foreign lands has given rise to the impression that it is an entirely new departure, whereas magistrates and justices of the criminal courts of New York have been releasing girls and boys, convicted of crime, on probation, always explaining that it was during their good behavior, for a period of over twenty years.

The New York Children's Court, technically known as "The Court of Special Sessions of the First Division, Children's Part," was opened September 2, 1902, by the authority of Chapter 590 of the Laws of 1902, and is authorized to try, and dispose of, all cases involving charges against children under sixteen years of age, except those in which the charge is a capital offense, or where the child is taken into custody jointly charged with crime with a person over that age. That law was drafted by one of the most eminent authorities on the bench, the Hon. Joseph M. Deuel, who for many years had studied and written upon the subject of juvenile crime, its causes and effects.

Our Juvenile Court has from the beginning been presided over by a succession of able men, who have lent dignity and distinction to its deliberations. It is the first Children's Court in the country whose hearings are held in a detached building, separate and apart from any other criminal court, and where cases of children *under sixteen years of age* exclusively are heard. There are many reasons why it would be impracticable to install such a court in a separate building in small communities, the chief one being that most of the children's courts outside of New York City hold but one session a week, and that in a court-room used for the hearing of all cases, adult and minor, even on the day set for the "children's court," the latter being held after the others are disposed of. There have been such "children's courts" in New York since 1892, when the legislature of this state passed laws separating children from adults charged with crime, and provided for their examination in criminal courts of inferior jurisdiction only after all persons not directly involved in the case being heard were ordered out of the room. There were seven such courts, one in every court district, and every one had its daily quota of children's cases. Most of the juvenile courts throughout the country to-day are following that erstwhile admirable plan. The necessary atmosphere of an exclusive children's court is thus preserved in exactly the same manner as intended by its incorporation.

The New York Society for the Prevention of Cruelty to Children is represented by officers at every session of the court for the boroughs of Manhattan and The Bronx. Its records are at once accessible to the presiding justice and, in numerous instances, suggest dispositions which, without them, would of necessity have to be deferred several days, pending lengthy investigations.

Every child arrested in old New York for any offense whatever is at once, as required by law, taken to the rooms of the society, if after court hours, and there detained until the next session of the Children's Court, for a hearing. To prevent overcrowding of the society's dormitories, where a

thousand children are sheltered every month, and to provide for the release of children arrested for minor offenses, such as violating corporation ordinances, or the newsboy or child labor law or for disorderly conduct, a law was passed two years ago by which a parent or guardian may sign a "personal recognizance," without giving bail security, for the child's production at the next session of the court. This also prevents the unnecessary and humiliating separation of petty offenders from their homes while judgment is pending. Our court is fortunate in having in daily attendance volunteer workers of the three great religions, who render a moral suport of too high a degree to permit of estimate. Their work is one of personal service, and it produces results far more satisfactory, both to the court and to the child, than any mere official decision ever could. These workers form the long-lost link between impartial justice, however merciful it may be, and the offending child. Their work is often done in assisting the chief probation officer, whose volunteer deputies they become on request.

Societies for the prevention of cruelty to children, as such, should not be mere alms-giving organizations. Such charity as they dispense should be given in connection with their work as agents of the law, in the enforcement of the criminal laws under which they operate. The opinion was long held by certain charitable societies that societies for the prevention of cruelty to children were charitable institutions, although authorized to appoint special officers with police powers, and to enforce special laws. The New York Society has had that much mooted question settled, on appeal, by the highest court in the state. The Court of Appeals has decided (The People of the State of New York *ex rel.* the State Board of Charities, Respondent, *vs.* The New York Society for the Prevention of Cruelty to Children, 161 N. Y. R. 233; 162 N. Y. R. 429) that *societies for the prevention of cruelty to children are sub-governmental agencies, and in reality branches of the courts, the district attorney's office and the police department;* that they are "*quasi* public corporations, authorized for the greater convenience and certainty of accomplishing governmental work." Their value as aids to the local government is at once apparent, in that they are branches of those various departments, and responsible to each for the work they perform. Such societies in New York State are now incorporated under Article V of the Membership Corporation Law (Laws of 1895, Chapter 559, Sections 70, 71 and 72), which amended Chapter 130, Laws of 1875, under which the first society was incorporated.

Should a society whose investigation of cases involving the social and moral welfare of half a million of children do anything more than state the facts to justify its existence?

Some two hundred thousand case records are on file in the vaults of the parent society, and its books show seventy thousand convictions for offenses against children. The society collects the evidence and prepares the "Brief for the People" in every criminal prosecution instituted by it, and has yet to be questioned by the chief prosecuting attorney of the county, whose deputies prosecute offenders against children on the society's Brief, relying entirely upon its investigations by expert officers. The number of convictions is the

justification of such a course. And in addition to prosecuting hundreds of criminals, its rooms shelter and it feeds and clothes ten thousand children a year. One hundred thousand children have been rescued and placed in homes away from improper influences. Men and women of standing not infrequently acknowledge that their respectability is due entirely to their early removal by the society from degrading environment.

The sub-joined table shows something of the growth of the work:

Year.	Cases investigated.	Homes found.	Prosecutions in cases of criminal assault, unnatural offenses and abduction.	Prosecution of all offenses.	Convictions of all offenses.	Penalties imposed, terms of imprisonment.	Children involved.	Adults involved.
1875	300	72	...	197	.....	.....	.....	.....
1880	1,577	855	...	604	569	.....	.....	.....
1885	4,638	2,979	...	1,790	1,729	.....	.....	.....
1890	7,477	3,336	...	2,590	2,553	.....	.....	.....
1895	8,523	5,350	109	3,301	3,249	147 yrs.	13,108	5,695
1900	9,146	6,092	163	2,060	1,875	163 yrs.	26,460	25,822
1905*	15,000	10,000	200	9,000	7,500	416 yrs.	45,000	35,000

* Estimated.

The organization of the first society was due to the accidental discovery, in 1874, of a case of atrocious cruelty to a young orphan girl. Her rescue brought about a revolution in the "humane" laws of the world. A generation of this work, with its marvelous growth to every corner of the globe, and the result of its efforts for children, make one wonder, not so much at the late date of its beginning, as at what the future may have in store for it, for any work but a generation old cannot be said to be more than well begun.[1]

The National Conference of Charities and Corrections, which was held at Portland, Ore., in July, was made notable by the discussion of three topics which had hitherto received comparatively little attention from the Conference, namely, the warfare against tuberculosis, immigration and the broad treatment of medical charities, from the administrative standpoint. Dr. E. T. Devine, who was chairman of the Committee on Tuberculosis, asserted that from the national standpoint, comparatively little is being done for advanced cases, and that practically nothing has been done for tuberculosis children, except to show by modest experiment, the marvelous results which can be obtained if suitable sanitoria are established. He called attention to the failure to segregate and specially treat consumptives in hospitals for the insane, in prisons, almshouses, reformatories and other institutions. Emphasis was laid upon the importance of providing special liberal diet in caring for consumptives in their own homes, as a substitute for the sanitarium. Dr. Woods Hutchinson, of Portland, who advocated the open-air sanitarium, declared that

[1] Contributed by E. Fellows Jenkins, Secretary and Superintendent, New York Society for Prevention of Cruelty to Children.

the tent is the ideal shelter, because it gives the maximum of fresh air with a minimum of expense.

Medical charities were discussed under the direction of the committee on the care of the sick, of which Nathan Bijur, of New York, was chairman. His paper on the "Ambulance System of the United States," is very comprehensive. In this section of the Conference, a notable paper was read by Dr. Walter Lindley, of Los Angeles, on the care of the sick in hospitals and in their homes, in which a plea was made for the establishment of hospitals for the independent, self-respecting working people, who can afford to pay a dollar a day for their care, and who do not want to be objects of charity.

Considerable friction developed between the East and the West, in the discussion of the immigration question. The Eastern men took the broad ground that there should be no check to the admission of healthy non-criminal persons from any civilized country, but that steps must be taken to provide for their distribution over a wider area, and that the difficulties of keeping out the unhealthy, the pauper and the criminal classes, are not inherent, but can be regulated by proper administration. To the surprise of the Conference, the secretary of the Californian State Board of Charities, insisted that there was an abundance of laborers in the West, particularly on the Pacific coast, and that the only class which the Pacific States are disposed to welcome, is the class of settlers with means, who can themselves employ labor and develop the land. The author of this account of the Conference, speaking from the standpoint of actual knowledge and experience of farming conditions in California, Oregon and Washington, challenged this statement, and offered testimony in contradiction.

Perhaps the most popular section was that on juvenile courts, which was in charge of Judge Ben. B. Lindsey, of Denver. The movement is still sufficiently new to be interesting, and much enthusiasm was aroused locally by the presentation of the subject by such men as Judge Lindsey, Judge J. W. Mack, of Chicago, and Judge Willis Brown, of Salt Lake. So far the Conference has limited its discussion of this topic and that of probation, to the methods which have been adopted in cities. The men who have done such good work in this connection, do not seem to have faced the problem of how to handle delinquent children in the rural districts. At any rate, no attempt was made to deal with this most important phase of the subject.

The 1906 Conference will be held in Philadelphia in May, under the presidency of Dr. E. T. Devine, and it is expected that the attendance will be large and thoroughly representative, and that it will mark a distinct step in advance in the scientific discussion of all forms of social welfare work.[2]

Crippled Children's Driving Fund.—This year has seen in New York the establishment of a Crippled Children's Driving Fund, which has for its object the giving to crippled and convalescent children, from hospitals and tenement homes, weekly rides to Central Park. Large four-seated carriages are used and the parties begun April 1st will continue in increasing numbers to November 1st. For the purpose of organizing these parties, the children are visited in their homes and a brief record is made of each child's disease; its cause,

[2] Contributed by Mr. Hugh F. Fox.

duration and treatment; names of parents and their nationality; number of rooms, their condition and the number of adults and children occupying them. An effort also is made to ascertain where and with how many persons the crippled member of the family sleeps. In some instances, mothers state with great pride that the child sleeps alone, and in the "front room"—which means that the gospel of fresh air preached by the Board of Health, dispensary physician, visiting nurse, relief visitor and the daily paper is beginning to be appreciated. It is a lamentable fact that so few hospitals have yet applied the fresh air treatment which many of their physicians recommend.

Proper housing conditions and cleanliness in the homes will reduce to a minimum the crippling disease. It is one of the offices of the Crippled Children's Driving Fund in its friendly relation with families where there may be one, two or three crippled children to trace with the mother the origin of her child's disease; show her how she can help to arrest it, and prevent similar suffering for other members of her family. With the co-operation of hospitals, dispensaries, schools, settlements, churches and relief societies a complete census of crippled children in New York will be made by the Crippled Children's Driving Fund which will then be prepared to add to its office of *prevention,* one of *arresting* and *curing*. Records will contain sufficient data to show the amount of provision necessary for proper treatment of the disease of a vast majority of the crippled children (tuberculosis of the bones) the most effective treatment being that of salt air, as proved at the seaside sanitoria of Italy, France and Germany and at the one established at Coney Island, in 1904, by the New York Association for Improving the Condition of the Poor.

The directors of the Driving Fund are confident that if the crippled children are taught thoroughly by their weekly pleasure drives the medicinal effect of the air, they will create a demand for fresh air in their hospitals and homes that cannot be ignored.[8]

London's Unemployed.—The agitation in regard to London's unemployed is going vigorously on. The Prime Minister is receiving frequent letters asking for information in regard to the Royal Commission which it is proposed to appoint to inquire into the subject, and when it is to be appointed. English people are greatly incensed at the Royal Commissioners not having been appointed as yet, and Mr. Balfour promises that it will be shortly done. Major Coates, M. P., says that the question is growing and is of constantly increasing importance and one that is difficult and perplexing. The poor classes of Englishmen do not want charity, they want employment for their labor, which is their only asset. This asset is a national one, and leading men of all classes, creeds and political opinions appear to be uniting in endeavoring to solve this question. "What we really want is an improvement in trade and then employment would be more diffused."

The English Housing Problem.—That the English people are thoroughly aroused to the housing problem is demonstrated by the number of articles that are found in the journals of London. A most interesting meeting on this subject has been held at Letchworth, where the rural housing problem was

[8] Contributed by Edna Gilbert Meeker, Superintendent.

discussed by two hundred delegates from fifty rural district councils who had travelled to the city from all parts of England. Twenty-eight counties were represented. The object of the meeting was clearly stated by the chairman, Mr. Alderman W. Thompson, of Richmond, Surrey, who stated that the founders of the exhibition of cheap cottages demonstrated that it was possible in the rural districts to erect cottages at a much less cost than those which had been put up as model cottages by large landowners. The cost of cottages built by the large landowners was $1,000 to $1,500 apiece, but the very cheapest, those that were erected in Norfolk, cost $1,600 a pair. It was clearly brought out that the cost of a number of cottages which had been built was $750 and they clearly demonstrated the possibility of erecting cottages with three good bedrooms and two living rooms and all the necessary and in some cases luxurious fittings for under $1,000. In stating this sum the chairman said that it did not include any profit for the builders nor the architects' fees nor a bath, nor the fencing. To cover this an extra 25 per cent. would have to be added to the price.

Mr. R. Winfrey, of Lincolnshire, stated that in that county they had made very material progress in the direction of getting men "back to the land." They had put two hundred tenants on one thousand acres of land, but the great difficulty was to find suitable houses. Many men were bringing up large families with only two bedrooms, under conditions which did not allow of common decency. He also stated that he knew of a number of young men who were desirious of marrying, but were debarred on account of not being able to get houses. It was clearly brought out by Miss Constance Cochrane, of the Housing and Sanitation Association, that it was important to ascertain from the agricultural laborers themselves what would be acceptable to them, what they wanted for a cottage. She said she had personally canvassed the views of fifty families in seven villages. Out of the fifty interviewed, forty-seven families asked that the cottages might have three bedrooms. They clamored for these above everything else. Very few expressed a desire for a bath, saying they were perfectly satisfied with the tub. Everyone wanted chimneys that did not smoke.

Mr. W. F. Craies, secretary to the Mansion House Council on Dwellings of the Poor, said that in his opinion many of the cottages that had been built were more suited to a week end tenant than to an agricultural laborer. He agreed with the last speaker that it would be wise to have a gathering of agricultural laborers in each county and to hear their personal views on the cottages that they desire. He said that there was great danger in districts near large towns of laborers being sacrificed to the week end tenant.

A delegate from Chipperfield, Hertfordshire district council, declared that in his village there was not one cottage with three bedrooms.

The chairman said that in presenting a resolution emphasizing the desirability of rural district councils, vigorously using the power they already possessed under the housing act, we were not to lose sight of the fact that councils would never get proper laws in force until they did their duty as builders of houses themselves.

The International Prison Conference at Buda-Pesth, Hungary, opened on the 3d of September, and twenty-three countries were represented by commissioners and delegates: America, Austria, Bade, Bavaria, Belgium, Bulgaria, Cuba, France, Great Britain and Ireland, Greece, Hungary, Japan, Italy, Mexico, Norway, Pays-Bas, Roumania, Russia, Finland, Saxe, Serbia, Suede, Switzerland. There were ten delegates from the United States present. The first meeting was held in the Salle d'honneur du Palais de l'Academie des Sciences.

His Imperial Highness, the Royal Archduke Joseph, received the credentials of the delegates, and welcomed the Conference in the name of the King of Hungary (Emperor of Austria). His Excellency, M. B. Lanyi, Minister of Justice of Hungary, presided over the Conference. A reception was given in the Castle of Archduke Joseph on the evening of September 3d, and the delegates were treated in the most cordial manner by Prince Joseph and the Hungarian Ministers.

On the morning of September 4th the secretary read the names of the vice-presidents and under secretaries. Dr. Louis Gruber, of Buda-Pesth, was made secretary. The various reports that had been made to the congress were summarized by M. Bela de Balas as follows:

I. The moral classification of prisoners is necessary.

II. The first class should contain the worst offenders, those recognized as such from the time of their arrival at the penitentiary or during their detention.

III. A special class should be organized for youthful offenders not absolutely bad. It should be incumbent upon all the authorities who come into contact with the prisoners to give a faithful account of them. The character of the condemned person should always be a matter of special study during the time of their incarceration.

IV. The remainder of the prisoners should be divided into three divisions as follows:

(*a*) Those whose conduct is exemplary.

(*b*) Those whose conduct is good.

(*c*) Those whose conduct is doubtful.

Although the treatment of prisoners should always tend to their improvement, the means used must differ in accordance with the requirements of each class. The *régime* should be more severe for the worst cases, while the patronage, extended to the others, more especially to the young offenders, should be of such a nature as to stand them in good stead at the time of their release.

After a long and animated discussion, the conclusions as presented were adopted, and made part of the proceedings.

A meeting of the third section, of which Mr. Samuel Barrows was president, discussed the following questions, which had been presented by Dr. Kuthy, co-reporter:

I. The principles of construction and installation of a modern establishment should be exactly formulated by a commission of experts appointed thereto by the International Congress.

II. A committee elected by the members of the congress should be entrusted with the careful regulation of all the hygienic measures taken by the penitentiary establishments.

III. A modern penitentiary establishment should be provided with a special division for temporary isolation, and with good accommodation for the sick.

This resolution was adopted unanimously, and Mr. Roger Troussel, as reporter of the section, was asked to lay it before the congress.

The following resolutions were introduced by M. E. de Barlogh, discussed at a general meeting, and adopted:

I. (*a*) The congress is of opinion that the destitute and deserted children of prisoners, should in the first place be the charge of the benevolent societies, and only in the second place of the community, the district, the department or any other administrative authority.

(*b*) Nevertheless it is the duty of the state to look after all the indigent and morally neglected children of prisoners, whenever the authorities know that the benevolent societies have not taken charge of them, or do not take proper measures to counteract their moral degradation; or if the community, the district, the department or any other administrative society do not properly discharge their duty; in short, if it appears from the reports made to the state authorities, that such children cannot be adequately provided for by private institutions or societies.

A proposition offered by Mr. Dreyfuss and seconded by the co-reporter was adopted to the effect that:

When there are no blood relations it is the duty of the state to protect and to educate the destitute children of prisoners, with the concurrence of the local administrations and the assistance of private persons and charitable societies.

Several public lectures were given between the sessions of the sections upon the following subjects: Juvenile Criminals, The Present State of Prison Discipline, The Mathematical and Statistical Bases of Criminality, and The Struggle Against the Criminality of Juvenile Delinquents in the United States of America, by Hon. Samuel Barrows, commissioner for the United States. The lecture delivered by M. de Wlassic gave an acount of the progress which had been made in Hungary in the management of its penal institutions.

M. A. Urbye, procuror general, etc., at the University of Christiania, gave a lecture upon the Norwegian penal systems.

Question I considered by Section II of the Conference was: "What are the best means for effecting a moral classification of prisoners and what may be the consequences of such classification?" The following report on this question was made by Dr. Curti, director of the penitentiary at Regensdorf, Zurich:

"The best way to arrive at an exact and moral classification of prisoners, would be by a system of rational and progressive education. Such a system should reckon with human nature with all its weakness. It should take account of the individuality of the accused, and work without prejudice on the broad principles of justice and impartiality.

"The fundamental principle of moral elevation and judicious classification is intimately connected with the principle of separate confinement. Every condemned person should, at the commencement of his term of penance, be kept isolated, day and night, and should be allowed no intercourse whatever with his fellow prisoners. He should be left to his own reflections and the remorse of his conscience; the silence of the cell, for this isolation will induce him to consider the consequences of his offence. This process of reflection should not be interrupted by any occupation of a distracting nature. Only the functionaries of the establishment, and more particularly the director and the chaplain are called upon, in this first stage, to exercise a mediatory and corrective influence upon the prisoner. They should endeavor to calm the storm that rages within him, evoke in him an exact understanding of the position in which he is placed in consequence of his crime, and provoke in him good and holy resolutions. Good and salutary literature will have a beneficial influence upon him. Correspondence between him and his relations might also be permitted on condition that this be carefully controlled.

"For young criminals school attendance would be profitable. For all, young and old, the attendance at public worship should be made obligatory, and the services should include music. There might well be special practice in singing. On Sunday afternoons the prisoners might be suitably entertained and instructed by conversations and lectures on history and geography.

"The duration of this first stage of the term of punishment should be sufficiently long for a real, sincere and lasting change for the better to take place in the condemned person. When the staff in charge of the establishment has become convinced that such is the case, the prisoner should be moved into a higher class, or rather into a second stage. He might then be allowed a few more privileges. The solitary confinement might be limited to the night only; in the day time the prisoner might be permitted to work in company with his fellows; the work assigned to him should also serve to develop his intellect. It should always be of such a nature as to render him capable, through the knowledge and skill thus obtained, of earning an honest living when he leaves the house of detention. Correspondence with relatives and also the visits he is entitled to receive, might also then be more frequent. His pay should also be increased, and he should be encouraged to use it to procure useful books, drawing materials, or to devote it wholly or partially to relieve the need of those belonging to him. From this second class might be recruited those appointed to undertake the housework of the establishment, and in whom therefore a certain amount of confidence must be placed. To the prisoners in this class might also be entrusted the work of the farm and dairy, and of the field and the kitchen-garden. They might also be allowed to adorn their cells with photographs of relations, flowers, or to keep a singing bird.

"The favors extended to the prisoners of the second class are increased for those in the third class. They are entitled to see their friends once a month and to receive letters once in four weeks. Their pay is also increased, but can never be used in any of these classes, to procure for themselves extra food and drink. Tobacco and snuff are always strictly prohibited.

"The fourth class, the highest, constitutes a kind of conditional liberty. This can only be granted to the non-habituals or to those who by rising from one class into another, have never given cause for complaint; who have proved that their conversion is serious and that they may safely be allowed a conditional liberty, previous to being restored to society."

Dr. Curti summarizes his report as follows:

"1. The best means for organizing an exact and moral classification of prisoners, is a system of rational and progressive education.

"2. The practical outcome of such classification would be: (*a*) for the first stage, solitary confinement day and night; (*b*) for the second stage, work in common, and solitary confinement at night; (*c*) third stage, as a transition towards complete liberty, conditional liberty."

Question II discussed by Section II of the congress was: "Can labor be enforced upon prisoners whose sentence on former occasions was merely privation of liberty? If labor cannot be so enforced, should not the deduction of preventive detention from the term of penal service be made subject to a voluntary acceptance of labor during detention?" This question was reported upon as follows by M. Jules Veillier, director of the House of Correction at Fresnes, Seine:

"Every one is agreed, in theory at least, that deprivation of liberty can only be imposed upon prisoners, whether accused or awaiting their trial. The tendency of the present day is even in favor of not imprisoning those awaiting their trial, except in cases of absolute necessity. We should therefore endeavor to give our prisoners every advantage compatible with their condition, and surround them with all such comforts as do not actually interfere with the order and safety of the institution. Thus in France, prisoners are allowed to have their meals brought to them from outside, to have better bedding and even a separate room; all of course at their own expense. They may wear their own clothes and retain their beard and hair; they may correspond every day with their friends and their solicitors upon all subjects; receive frequent visits and devote to the preparation of their defence all the time they deem necessary.

"But can labor, although bearing a penal character, be looked upon as a serious aggravation? I think not. From the prisoner's point of view it is, I believe the only means to beguile the weariness and the anxiety of the days of suspense. Modern society does not admit of idleness, and where the administration of the prison systematically arranges the prison labor and directs the minds of the prisoners to recognize the benefit of work, they seldom find much difficulty in making the prisoners work with good will. I speak from long experience, and can honestly say, apart from some very serious and complicated cases, where all the attention of the prisoner is absorbed in his defense, they are glad of work and apply themselves assiduously to it.

"Exceptions to this rule are generally due to the fact that in many houses of detention the industries practised are not remunerative, bring dust and dirt with them and wear out the clothes. The prisoners object to this as it makes them unpresentable to receive their friends and their legal advisers.

"These objections deserve careful consideration, and rather favor the

idea of leaving things as they are now, that is to say that the prisoner in preventive detention is at liberty to accept or to refuse the work offered to him. Moreover, it will always be difficult in the case of preventive detentions, which are generally of comparatively short duration, to organize a suitable system of labor adaptable to all the requirements. Nevertheless the liberty of refusing to work should, I think, be limited. The fact of being imprisoned, may be innocently, should not necessarily prevent a man from earning his living. No one has a right to neglect the material things of life, or to fail to obtain them honestly. Therefore the prisoner should be compelled to work, or if financially independent, should be required to pay into the treasury such portion of the profits of which the prison is deprived through his idleness. Such profits are very small, representing only a few pence per day, yet in most cases the prisoner would be led to accept the work offered him. In order to guard the absolute liberty of the prisoners with regard to the interests of their defence, a release from paying these small obligations could always be given those who are without means and who are considered justified in spending all their time in the preparation of their defence. I think we must not stretch the point any further or admit that in sanctioning non-submission to the rule of labor, we can refuse to deduct the preventive detention from the term of penal service. Nor do I think that we ought to make a distinction between individuals with criminal records and those who are charged for the first time, chiefly for this reason. To my knowledge the prisoner who has already previously been brought to justice, almost always asks for work directly he enters the prison."

The report was summarized as follows:

"1. For the purpose of being entirely at liberty to prepare their defence, labor should not be enforced upon prisoners whether previously condemned or not.

"In any case, as the obligation to provide for himself devolves upon prisoners, even if reputed innocent, in the same degree as upon all citizens, they must support themselves or pay into the treasury that portion of the profit of the work which is due to it in accordance with the penitentiary regulations.

"In certain exceptional cases, indigent persons who are considered justified in spending all their time in the preparation of their defence, can be relieved from this obligation by special decision of the authorities."

INDEX OF NAMES

ABBREVIATIONS.—In the Index the following Abbreviations have been used: *pap.*, principal paper by the person named; *com.*, communication by the person named; *b.*, review of book of which the person named is the author; *n.*, note by the person named; *r.*, review by the person named.

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